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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 384

HOWARD E. BREISCH, PETITIONER,

vs.

CENTRAL RAILROAD OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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INDEX.

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 2, 1941.

—1741

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 129

HOWARD E. BREISCH

vs.

CENTRAL RAILROAD OF NEW JERSEY

I.

DOCKET ENTRIES

December 29, 1938. Complaint filed.
December 29, 1938. Summons exit.
January 6, 1939. Appearance of Aubrey & Friedman, Esqs., for Defendant filed.
January 20, 1939. Summons returned: "on Jan. 3, 1939, served" and filed.
February 2, 1939. Affidavit of defense filed.
February 14, 1939. Plaintiff's demand for jury trial filed. Served February 7, 1939.
February 14, 1939. Praecipe to place case on trial list filed.
April 26, 1939. Jury called and sworn.
April 26, 1939. Trial witnesses sworn.
April 27, 1939. Trial resumed.
April 27, 1939. Verdict for Plaintiff in $12,000.
April 27, 1939. Judgment in favor of plaintiff in $12,000. filed. 4-22-39 Noted and Notice mailed.
May 3, 1939. Defendant's motion for judgment on point of law reserved, filed.
May 18, 1939. Testimony filed.

May 19, 1939. Argued sur defendant's motion for judgment.

June 8, 1939. Opinion, Dickinson, J., denying motion for judgment n. o. v. and for a new trial filed.

July 11, 1939. Defendant's notice of appeal filed. Copy to F. B. Gernerd as to D. Getz.

July 11, 1939. Bond for costs sur appeal in $250., with U. S. Fidelity & Guaranty Co., surety filed.

July 11, 1939. Copy of Notice to U. S. Circuit Court of Appeals, filed.

Aug. 16, 1939. Stipulation of counsel extending time for filing record on appeal filed.

Sept. 23, 1939. Statement of points to be relied upon on appeal filed.

Sept. 23, 1939. Stipulation of counsel as to certain omissions in record filed.

Sept. 23, 1939. Stipulation of counsel as to contents of record filed.

Oct. 9, 1939. Transcript of record transmitted to U. S. Circuit Court of Appeals.

Oct. 10, 1939. Stipulation of counsel as to omissions from printed record filed.

II.

COMPLAINT

(Filed Dec. 29, 1938)

1. The plaintiff is a citizen of the State of Pennsylvania, residing at Coopersburg, Route 1, Pennsylvania, and the defendant is a corporation incorporated under the laws of the State of New Jersey.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

3. During all the times herein mentioned, defendant owned and operated in interstate commerce, a Railroad which runs through and serves various industrial plants located in the City of Allentown, County of Lehigh, State of Pennsylvania.

4. On and for some time prior to the 31st day of December, 1936, the defendant maintained and provided an engine crew consisting of a conductor, engineer, fireman, and brakeman for the purpose of making daily movements of certain freight cars, both loaded and empty, on the property of the American Steel and Wire Company, a company operating a wire mill located in the City of Allentown, aforesaid.

5. The plaintiff who has been in the employ of the defendant company for a period upwards of twenty-six years, was a member of the crew employed by the Central Railroad of New Jersey, for the purpose of operating in the yard of the American Steel and Wire Company, and was on this particular day assigned to the said crew as an extra conductor.

6. On or about, the 31st day of December, 1936, the crew to which plaintiff had been assigned while in the act of shifting freight cars in the yard of the American Steel and Wire Company at Allentown, Pennsylvania, negligently caused a loaded freight car to run away from its engine.

7. The Plaintiff, in the course of his duties, boarded the run-away car and attempted to apply the hand brake of the said run-away freight car in order to prevent a collision with another freight car standing on the same tracks. Plaintiff made every effort to apply the hand-brake which brake failed to respond, causing the run-away car to run into another standing freight car, thereupon causing the said run-away freight car to rebound backward and forward again, thereby crushing the plaintiff's right foot.

8. The defendant Railroad Company, contrary to the provisions of the Safety Appliance Act, failed to provide, and permitted the plaintiff, its employee, to handle a freight car which was not equipped with certain required safe and secure appliances, particularly of a defective hand brake on the said freight car.

9. By reason of defendant's negligently operating its freight cars, and by reason of the defendant's further negligence in permitting plaintiff to operate and work on freight cars with defective brakes, coupling, and other faulty equipment, the plaintiff, while in the employ of the defendant company, sustained serious injuries, particularly to his right foot, which was so badly crushed that the said foot of the plaintiff had to be amputated, and subsequently, an additional part of plaintiff's right leg had to be amputated.

10. Prior to these injuries plaintiff was a strong, able-bodied man, capable of earning and actually earning

fifty dollars a week. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of $500.00 for medicine, medical attendance, and hospitalization, and will be obliged to continue to expend large sums for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of $75,500.00, and costs.

(s) FRED B. GERNERD,
502 Hamilton St.,
Allentown, Pa.

(s) DAVID GETZ,
Attorneys for Plaintiff.

DAVID GETZ,
Colonial Building,
Allentown, Penna.

III.

AFFIDAVIT OF DEFENSE

(Filed Feb. 2, 1939)

The defendant, The Central Railroad Company of New Jersey (herein sued as Central Railroad of New Jersey), through its attorneys, Aubrey & Friedman, Esqs., hereby makes answer to Plaintiff's Complaint in the above cause of action as follows:

1. Admitted.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

3. Denied. Defendant admits that at the times mentioned in the Complaint it owned and operated a railroad which runs through and serves various industrial plants located in the City of Allentown, County of Lehigh and Commonwealth of Pennsylvania, but denies that during all the times mentioned in the Complaint the same was operated in interstate commerce.

4. Admitted.

5. Admitted.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment in paragraph 6 of the Complaint.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment in paragraph 7 of the Complaint. Defendant further

avers, upon information and belief, that the injuries alleged to be sustained by the plaintiff were caused in whole or in part, or were contributed to by the negligence or want of care on the part of the plaintiff and not by the fault, negligence or want of care on the part of the defendant, and further, that they were the result of obvious risks of his employment which the plaintiff assumed.

8. Defendant denies the facts set forth in paragraph 8 of the Complaint. Defendant further avers, upon information and belief, that the freight car handled by plaintiff was fully and properly equipped with safety and security appliances in conformity with the Safety Appliance Act and that the hand brake on the said freight car was in good order at the time of the accident.

9. Defendant denies the facts set forth in paragraph 9 of the Complaint and avers that the injuries mentioned in the Complaint were the result of obvious risks of employment which the plaintiff assumed and, moreover, were caused in whole or in part, or were contributed to by the negligence or want of care on the part of the defendant and not by any negligence or fault or want of care on the part of the defendant.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of plaintiff's averment that prior to these injuries plaintiff was a strong, able bodied man, capable of actually earning $50. a week and by reason of these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of $500. for medicine, medical attendance, and hospitalization, and will be obliged to continue to expend large sums for medicine, medical attendance, and hospitalization.

11. As a further defense to the Complaint, defendant avers that at the time plaintiff was injured, his work con-

sisted solely of the handling of cars containing no interstate shipments and moving wholly within the Commonwealth of Pennsylvania, and that at that time and in this connection neither the plaintiff nor the defendant were engaged in interstate commerce.

12. Defendant further avers that at all times mentioned in the Complaint, as well as at the time of the commencement of this action, there was in full force and effect in the Commonwealth of Pennsylvania a certain public act or statute known as the "Workmen's Compensation Act of 1915" and its amendments, which provided for an elective system of compensation for personal injuries, or for the death of an employee caused by an accident arising in the course of his employment, to be administered and enforced by a tribunal in said act established and known as the Bureau of Workmen's Compensation.

13. Defendant further avers, upon information and belief, that no statement in writing from either the plaintiff to the defendant or from the defendant to the plaintiff that the provisions of the said Workmen's Compensation Act of 1915 were not intended to apply was ever made nor was a copy of such a statement ever filed with the said Bureau of Workmen's Compensation, as required by Article III, Section 302 (a) of the said Act, and therefore, both the plaintiff and defendant had accepted the compensation provisions of said Act and both the plaintiff and this defendant were bound thereby at the time of the happening of the accident mentioned in the Complaint; and the defendant, prior to the time of the injury to the plaintiff mentioned in the Complaint herein, had duly complied with the provisions of the said Workmen's Compensation Act of 1915 and had furnished satisfactory proof to the Bureau of Workmen's Compensation of its financial ability to pay such compensation for itself.

14. Defendant further avers that the sole measure of

liability for the injuries mentioned in the Complaint is that prescribed by the said Pennsylvania Workmen's Compensation Act of 1915, and its amendments, and that plaintiff has no remedy at common law, or under the Federal Employer's Liability Act, or the Federal Safety Appliance Act, or otherwise enforceable in this Court for the injuries mentioned in the Complaint, and that therefore this Court has no jurisdiction of the subject matter of this action.

Wherefore, defendant prays that judgment may be entered against the plaintiff and for the defendant, together with the costs of this suit.

AUBREY & FRIEDMAN,
By: (s) G. W. AUBREY,
Attorneys for Defendant,
605 Commonwealth Building,
Allentown, Pennsylvania.

State of New York,
County of New York ss:

Wm. Kohler, being duly sworn, deposes and says: That he is Secretary and Treasurer of The Central Railroad Company of New Jersey, the defendant in the within action; that he has read the foregoing Affidavit of Defense and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further says that this verification is made by him and not by defendant for the reason that said defendant is a foreign corporation; and that the sources of his information and the grounds of his belief are statements and reports made to him by other officers and employees of said defendant corporation,

(s) WM. KOHLER.

Sworn to and subscribed before me this 28th day of January, 1939.

(Notarial Seal)

(s) GROVER C. MILLER,
Notary Public,
New York County Clerk's No. 174, Register's No. O. M. 212.

Commission Expires March 30th, 1940.

IV.

TESTIMONY

(Filed May 18, 1939)

Before:

Hon. Oliver B. Dickinson, J., and a Jury

Philadelphia, Pa., April 26, 1939

Present:

Fred B. Gernerd, Esq., and David Getz, Esq., representing the Plaintiff.

Henry B. Friedman, Esq., representing the Defendant.

Jury impaneled and sworn or affirmed April 26, 1939.

TRANSCRIPT OF THE TRIAL RECORD

PLAINTIFF'S EVIDENCE

HOWARD E. BREISCH, having been duly sworn, was examined and testified as follows:

Direct Examination

MR. GERNERD: If the Court please, I will have to speak a little loud, because this witness is dull of hearing, so that Your Honor may know,—

THE COURT: I noticed that, and you will recall as an accompaniment to that affliction that a man often speaks very low himself,—

MR. GERNERD: That is correct.

THE COURT: —so make clear to him he is to keep his voice up so all the jury can hear him.

BY MR. GERNERD:

Q. Mr. Breisch, when you speak, speak loud, so that this jury will hear every word that you utter, as well as the Court. What is your name?

A. Howard E. Breisch.

Q. And where do you live?

A. Coopersburg, route 1.

Q. Where is Coopersburg?

A. That is about eight miles from Allentown.

Q. Yes, and what was your employment prior to the 31st of December, 1936?

A. Regular extra conductor for the Central Railroad of New Jersey.

Q. How long were you employed by the Central Railroad of New Jersey prior to that date?

A. Since 1910, about twenty-six years.

Q. About twenty-six years. How long have you been a railroader?

A. Oh, about thirty-nine years.

Q. Thirty-nine years?

A. All told; mostly conductor.

Q. Mostly—

A. Conductor.

Q. Conductor?

A. Yes.

Q. Was this all passenger crews or freight crews?

A. Freight crews.

Q. Freight crews. Do you recall the morning of the 31st of December, 1936?

A. Yes, sir.

Q. Will you kindly tell His Honor and this jury just exactly what you did that morning?

A. On December 31st, 1936 I was called to conduct a drill engine at the American Steel and Wire Company, at Allentown, and 7 A. M.

Q. Now, wait, Mr. Breisch, what do you mean by a drill engine?

A. Well—

Q. Or drill crew.

A. A drill engine is an engine that shifts around cars, spots cars for loading and re-loading, classifies cars for trains.

Q. All right, go ahead.

A. I was called for 7 A. M. in the morning. I arrived at the wire mill maybe about five minutes of seven. I stopped at this scale shanty, or also the yard master's shanty office, to inquire what was going on. He wasn't there, so I walked in the trainman's shanty and looked around to see what I could do, and I found a slip of paper with some work on there, so I took the slip—

Q. Pardon me, where did you find this slip?

A. On the desk in the shanty.

Q. Shanty of what?

A. In the trainman's shanty.

Q. Oh, the trainman's shanty.

A. And I walked out, and the yard master still wasn't in his office, so I searched for the crew, and they come east from the south end of the building, they were just coming down from the south side of the building, and I jumped on the step, and I asked the fireman where he was going, and he said on the scale track, so I knowed that the—that the crew somehow or another knew what was going on without me telling them, although I was on—I was on—I was going to tell them to come in on the scale, because that was the first job on this slip.

Q. Now, what was on this slip?

A. Well, the first—

MR. FRIEDMAN: Now, wait a minute, if the Court please, that is objected to as being incompetent. The slip would be the best evidence.

THE COURT: The which?

MR. FRIEDMAN: The slip would be the best evidence.

THE COURT: What do you mean by the slip?

MR. FRIEDMAN: I understand he is testifying about some paper or document.

MR. GERNERD: If Your Honor please,—

THE WITNESS: Well, the work was on the paper, this job that I was—

THE COURT: Just a moment.

MR. GERNERD: Just a moment. When he reported—

THE COURT: Well, is he proposing to tell us what was on the paper?

MR. GERNERD: Yes, sir.

THE COURT: Well, the objection is the paper is the best evidence.

MR. GERNERD: We will now explain what happened, I am going to ask him what happened to that paper.

THE COURT: Now, you may lay the ground to introduce secondary evidence, of course.

BY MR. GERNERD:

Q. That slip contained what, that writing?

A. Some drill work, shifting work.

Q. You mean it had upon that what you were to do—

A. Yes, sir.

Q. —as conductor that morning?

A. Yes, sir, partly, part of that morning.

Q. Yes, and what became of that slip?

A. Well, I don't know, I had it in my hand, to get the light weight and the capacity of the car, and put on behind the number of the car, when she come in on the

scale. Of course when I seen this car break loose I made for the car. Now, whether I put it alongside, in my pocket, or lost it, I never had it on my person after that, I never found it, unless it was lost in the hospital somewhere when they undressed me, I don't know.

Q. In other words, that slip that you got in this house, the trainman's house, you don't know what became of it?

A. No, sir.

Q. It is lost?

A. Lost.

Q. Did you make a search for it?

A. Well, not particularly, I had nothing to search for but my overalls at home, and, of course, I never—I never searched for it because I—

THE COURT: Well, is he able to produce it?

BY MR. GERNERD:

Q. Are you able to produce—

A. No, sir.

Q. —that slip?

A. No, sir, no, sir.

Q. What was on that slip, if you recall?

A. Well, the first was to get a car off of the scale, that is on the dead rail of the scale and put it on the scale to weigh it, a car of scrap, commercial gondola with scrap, and weigh it.

MR. FRIEDMAN: Just a minute, now, if the Court please, at this time we make a further objection to this testimony as being irrelevant, and, also, there is nothing to show that this slip was given by any proper authority on behalf of the railroad, and I think we can clear that up if we interrogate the witness.

THE COURT: Well, you have the right to cross-examine on the question of his ability to produce it.

MR. FRIEDMAN: Not only to produce, I am not only raising my objection now to the production of the slip, but to the relevancy.

THE COURT: Well, I understand—

MR. FRIEDMAN: I don't believe this was a slip of the Central Railroad.

THE COURT: As I understand, these were simply written orders, weren't they?

MR. FRIEDMAN: By whom?

THE COURT: I would like to know by whom.

MR. FRIEDMAN: Well,—

THE WITNESS: I don't know, by somebody—

BY THE COURT:

Q. Well, but you received it as your orders, did you?

A. Yes, sir; that is what I took it for, my orders.

Q. You took it for your orders.

THE COURT: All right.

MR. FRIEDMAN: Now, may I ask the witness, then, from whom he got this slip,—

THE COURT: You may ask him, yes.

MR. FRIEDMAN: —before we go into it?

THE WITNESS: It was on the desk. I don't know who put it there. It was on there.

BY MR. GERNERD:

Q. What desk?

A. In the shanty, in the trainman's shanty.

BY THE COURT:

Q. Well, was that the place to which you went—

A. Yes, sir.

Q. —to get your orders?

A. That is where we always look, we look around to see what is going on, the yard master—

Q. Well, what I mean, in the ordinary course of business you would go in, and if you saw orders lying on the desk—

A. It would—

Q. —you would take it for granted they were meant for you?

A. Work orders, yes.

Q. And they would be your work orders which you would follow—

A. Yes, sir.

Q. —in your work?

THE COURT: All right, now, we have it.

MR. FRIEDMAN: Now, I renew the objection, if the Court please. There is nothing to show that these slips were issued on the authority of the defendant company, and, as a matter of fact, we can prove to the contrary.

THE COURT: Well, all right, when you get to the proof you will address that to the jury and they will find the fact, but for the present I will overrule the objection and give you an exception.

BY MR. GERNERD:

Q. Now, Mr. Breisch, what was on this slip that you read?

A. Why, this car of scrap on the dead rail of the scale.

Q. Did it have a number?

A. Yes, sir, Reading 20970, commercial gondola of scrap, it was put on the scale and weighed for Jersey City.

Q. Was the word "Jersey City" in back of this?

A. Yes, sir.

Q. Were there any other cars, any other orders, on this order slip?

A. There was some—some work, some car to E-port, but I didn't pay much attention, because I was interested in this job first, I don't recall the rest.

Q. What do you mean by E-port?

A. Elizabethport, a car, maybe a car moved from number 2 to Elizabethport.

Q. You mean to be moved from number 2—what do you mean by number 2?

A. Well, that is a track where the car was on.

Q. Yes, I know, but—

A. From this scale, the scale had it at—

Q. Well, Elizabethport is where?

A. Over in Jersey City—over in Jersey.

Q. Over in the State of New Jersey?

A. New Jersey, yes.

Q. Yes.

A. Me, call it E-port.

Q. Well, I know, but E-port, were those the initials on this slip?

A. E-port, yes.

Q. Yes

A. E. p.

Q. And that is supposed to be Elizabethport,—

A. E-port, yes.

Q. —New Jersey, and this particular car that you speak of, that you gave the number of, had a destination on there as to where it was to go?

A. Yes, yes, sir.

Q. Well, where was it?

A. The number of the E-port train?

Q. No, no, no, the first car we are speaking of.

A. The number was 90—20970.

Q. Yes, and where was that to go,—

A. That was—

Q. —according to this order?

A. Jersey City, scrap.

Q. Jersey City?

A. Yes.

Q. Where is that?

A. Over in Jersey.

Q. State of New Jersey?

A. State of New Jersey.

Q. Well, this engine, or this crew, was made up of ow many men?

A. Myself as the conductor, and two brakemen, engi- eer, and fireman.

Q. Yes, then this car number of two thousand and— hat was the number?

A. 970.

Q. Two thousand, seven—

A. 970.

Q. Was that gondola car shifted from what they call ie dead rail—is that what you call it?

A. Dead rail of the scale on the scale, the dead rail there so—and engine ain't allowed to run over the scale, ou know, so they got a dead rail, if you want to go be- ond the scale with the engine you have to go over the ead rail and not use the scale. The rails are only about x or seven inches apart.

Q. Yes, and your crew was in the act of doing what, utting this car on the scale?

A. Taking this car off the dead rail, pull it back and ove it in on the scale to weigh. I was standing about the iddle of the scale, and for some reason or other this car ome—become attached from the engine.

Q. Do you mean detached?

A. Detached, yes.

Q. Yes.

A. From the engine, and sneak down, and I just hap- ened to see it, and I jumped on the car and I shoved on ie brake, and she didn't respond, and I give her another vist, and another jerk, and I hung on to it, thinking she ould hold in a minute, but she didn't take up, and gradu- lly picked up after she got off the scale.

Q. And what happened?

A. Then she went down and bumped into the car potted on 2, as this scale track leads out on to 2, where ars were spotted for loading and re-loading, and natur-

ally, I jumped on this car to save any damage, somebody might be accidentally walking in there to unload or load something, and when I did hit this car, the car—that car I hit was spotted away from the next car, and I did hit and bumped down to the next one, and the rebound knocked me over, knocked me off my balance, and I stepped for the drawhead, there was no end sill on the car where I hit, I had to step for something so I wouldn't go in under, and that is the way I got caught with my foot.

Q. Were you thrown off your balance?

A. I was thrown off of me balance, over into the coupler.

Q. Was this car running wild before it reached the scale?

A. Yes, sir, she was detached from the engine.

Q. What?

A. Yes, sir, it was running wild, it wasn't coupled up to the engine.

Q. I know, but I mean before it reached the scale was it running wild before it actually reached the scale?

A. Yes.

Q. And when you jumped on this car, this runaway car, how far was that runaway car from the car that was standing on the dead rail into which you ran, and into which this wild car ran?

A. You mean when I come in on the scale, when I got on the car—

Q. Yes, how far—

A. —and broke loose?

Q. How far did that runaway car travel before it collided with the—

A. Four rail lengths, I judge.

Q. Four rail lengths?

A. Four rail lengths.

Q. And what do you mean by a four rail length? What distance is four rail lengths?

A. Well, a rail length is thirty feet.

Q. Thirty feet?

A. What we call a rail length.

Q. So it would be about one hundred and twenty feet—

A. Yes.

Q. —that this wild car ran after you jumped on this car and applied the brake?

A. Yes, sir.

THE COURT: Well, while counsel are looking at the papers, have you covered the technical question of diversity of citizenship? Has he testified that he is a citizen of Pennsylvania?

MR. GERNERD: Yes, sir, he has testified to that, Your Honor.

THE COURT: That is all right, I didn't catch that.

MR. GERNERD: Yes, he has testified, he said he lived at Coopersburg.

THE COURT: Well, e lived there—

THE WITNESS: I was born in Philadelphia.

BY THE COURT:

Q. Well, you are a citizen of Pennsylvania?

A. Oh, my, yes, yes.

BY MR. GERNERD:

Q. How long have you lived at Coopersburg?

THE COURT: All right.

A. Well, I lived in Coopersburg since I was seven years old.

BY MR. GERNERD:

Q. And you lived there at the time this accident happened?

A. Oh, yes.

Q. In other words, you were a voter of Pennsylvania?

A. Yes, sir.

Q. All right, and you still are, are you?

A. Yes, sir.

(Photographs were marked Exhibits P-1, P-2 and P-3)

BY MR. GERNERD:

Q. Mr. Breisch, I show you Exhibit 2. I don't know whether those jurors—

A. I can walk over there if you want me to.

Q. All right, come down here, perhaps you can help us out.

THE COURT: Oh, do you want to move him?

THE WITNESS: I will be all right.

MR. GERNERD: No, that will be all right, just stay where you are. I think we can explain it to the jury.

THE COURT: Well, now, what is it, a photograph?

MR. GERNERD: It is a photograph, yes, sir.

THE COURT: Well, can it be offered in evidence?

MR. FRIEDMAN: I have no objection.

THE COURT: No objection, well, then, show it to the jury first.

MR. GERNERD: Yes.

THE COURT: Let them familiarize themselves with the situation.

MR. GERNERD: Here is a photograph—

THE COURT: Well, just let them study the photographs,—

MR. GERNERD: Pass them along.

THE COURT: —and then you can explain them afterwards.

(The photographs were shown to the jury.)

THE COURT: Have counsel a copy of the Pennsylvania Compensation Act here?

MR. FRIEDMAN: I don't have any. I have cited it in the affidavit of defense.

THE COURT: I know you have, but I want to see the Act.

MR. GETZ: If Your Honor wants it I will get it.

THE COURT: All right. no hurry about it. We ought to have it. You may ask him any question—

BY MR. GERNERD:

Q. On this photograph here the inside rail, is that what is known as the scale rail?

A. Yes, sir.

Q. And the outside rail is what is known as the dead rail?

A. Dead rail.

Q. And the car that you ran into was standing on the dead rail?

A. No, standing on 2.

Q. Well, what do you mean by 2?

A. Why, the dead rail is the rail that runs alongside of the scale. It don't go over the scale, see. An engine there—the reason that dead rail is there is for an engine to go in without interfering with the scale track, because you daresn't run an engine over the scale.

Q. Yes.

A. That is what they call a dead track, well, it is really a dead track until it gets beyond the switch that leaves from the scale through on to 2, although you can use that dead track to go down on 2. That is what the dead track is for. Naturally—

Q. In other words—pardon me.

A. Naturally, the dead scale track also heads out on 2, and the same car—that is where I came down on, the car that was spotted on 2.

Q. Is that the track adjoining the building?

A. Yes, sir.

Q. As shown by these photographs in the distance?

A. Alongside them buildings there.

Q. Yes.

A. In the photograph.

Q. And that is the track which you call number 2?

A. Yes, sir.

Q. Now, when you come to the photograph showing where the scale is there is a scale track and what is known as a dead track?

A. Well, it is a dead—

Q. Now, wait, and they lead, after the car is weighed on the scale and pushed on, they lead on to track number 2?

A. Yes.

Q. In other words, the dead track as well as the scale track finally lead into track number 2?

A. Yes.

MR. GERNERD: In other words, can you folks see from there?

A JUROR: Yes.

BY MR. GERNERD:

Q. Now, will you point out on this Exhibit 3 just what you mean, so that this jury can understand what you mean by the—now, wait,—

A. Well, that—

Q. Now wait, this way.

A. Oh, that there is the worst end, the worst end of the siding number 2, that there is number 2 track.

Q. You mean down in there (indicating)?

A. Yes, below that scale switch. Here is your dead track.

Q. Where is your dead track?

A. That is your dead track (indicating).

Q. Is this up at the scale here, is this a part of the scale here (indicating)?

A. Yes, and that is on the outside.

Q. Well, that is all right.

A. This here is the dead track, this too is dead track, and that there on that one is a scale. Now, you can—you can come down on 2, by using the dead rail, or you can come down on 2 by using the scale, there is a switch, so you use what they call a dead rail between this switch and the east end of the scale. The switch enters into the scale track.

Q. And this down here enters into—

A. 2.

Q. —track number 2?

A. Yes.

Q. Which you call track 2?

A. This here is track 2.

Q. Yes, now, where—

A. No cars on there just now.

Q. All right, looking at Exhibit 3, point out where this car was standing that you ran into with the wild car.

A. I wouldn't say how far below that building, below the corner of that building, but it was—

Q. Below the corner of that building?

A. —five foot or more, maybe, when I hit it.

Q. You mean when this runaway car ran into the car that was standing there—did you folks, did you understand what we mean by dead rail?—can you show by Exhibit 1 where this building was that you got this order, this written order?

A. That was the trainman's shanty.

Q. Is that the trainman's shanty, is that the building that the trainmen use?

A. Yes.

Q. And where they get their orders from to do work here in connection with shifting cars?

A. The yard master—

Q. Yes.

A. That is where they eat their dinner. That is what they call the trainman's shanty.

Q. And is there where you get your orders?

A. That is where I got my orders, yes.

Q. Yes, had you worked in this yard before?

A. Yes, sir.

Q. Did you get orders there before?

A. Yes, sir.

Q. At this same place?

A. Yes, sir.

Q. Now, Mr. Breisch, you said this car 20970, this runaway car, was what kind of a freight car?

A. What they call a commercial steel gondola, three foot high.

Q. What is it—

A. With a hand brake on.

Q. Is it known, commonly known as a gondola car?

A. Gondola, yes.

Q. In other words, it is an open car?

A. Open car.

Q. It is not encased, enclosed?

A. No, not enclosed.

Q. And have you any idea of the length of this car?

A. I am a little off on them series; I think it is forty-two foot, though.

Q. You mean the gondola car, the runaway car, in your judgment—

A. Forty-two foot.

Q. —was forty-two foot, and you say it had a hand brake?

A. Yes, sir.

Q. Will you explain to this jury as best you know what kind of a hand brake it had and where it was located with reference to this car—I mean on this car?

A. Well, it is a brake—the brake staff with a wheel on it, and the chain comes from the brake, the brake shoes,

and wraps around this—around this brake staff and pulls the brake on as you wind it up.

Q. Well, have you had experience in operating hand brakes?

A. Oh, yes, after thirty-nine years of railroading I had lots of experience.

Q. With that kind of a brake?

A. Same thing, type car.

Q. With that same kind of a brake?

A. Yes, sir.

Q. The same type?

A. Yes, sir, same type.

Q. Exactly like that?

A. Yes, sir.

Q. Have you any idea of the length of the chain at the base of this brake?

A. What do you mean, from the—on that car or on all cars?

Q. Well, I mean that—well, the—

A. Well, some have different—different lengths, some have different lengths of chain, but just—it just depends on how far it is from the brake staff and the brake rod.

Q. I see, now—

A. Some have—some have too much chain—

Q. Yes.

A. —and get clogged up when you wind—when they wind around that brake stem. That is what—that is what keeps you from pulling any harder. Then, again, the brake rod sometimes catches somewheres and won't let you pull, then—all kinds.

Q. Do you know what actually happened that morning—

A. Well, I—

Q. —when you applied that brake?

A. I was going to look, but when I stepped off the car I had my foot mashed and my leg broke, when I stepped

off the car I had an awful pain and I forgot all about it. I seen there was lots of—

Q. Now, if this car had worked, I mean, if that brake had operated or re ponded when you applied it could you have stopped that car and prevented it from running into this other car?

A. You bet I could. I only wish I had—I could say how quick I could stop it if I—

Q. Well,—

A. I could easy stop it in that distance, see?

Q. In what distance?

A. In the distance from where I jumped on, at the time I had the brake applied, I judge it would be about three and one-half rail lengths, I could easy stop it in that, at the rate of speed it was going, between two and a half and three mile when I jumped on, but it picked up gradually, I wouldn't say just how much, because that is impossible for me to say that, because I was only interested in stopping the car.

Q. I see.

A. I wasn't interested in anything else, just stopping the car.

Q. Well, that was a loaded car with scrap?

A. With scrap, yes, sir.

Q. And you say you have experienced braking the same kind of a car with the same kind of a brake and loaded?

A. Yes, sir, all kinds of cars I have experienced braking.

Q. Well,—

A. This particular—

Q. —this particular car, if this brake had responded and worked that morning within what distance could you have stopped that car, taking into consideration the speed at which it was then traveling when you jumped on that car?

A. Well, between forty-five, fifty foot.

Q. Forty-five, fifty foot, and you say this car ran—the moment you got on—four rail lengths before it struck this other freight car?

A. Since before I got on, when I got on, I judge about three and one-half, after I spun the brake. It only took me a minute to spin the brake around, it only took two steps to get on, the brake was right at the end where I got on.

Q. I see.

A. So it was just merely a step up and started to pull, I spun the wheel around, I always, when I am in a hurry like that, I spin the wheel with my hand.

Q. So that after you actually had given your full strength to this brake it didn't respond, did it?

A. No.

Q. And it continued to run wild?

A. Yes, sir.

Q. Well, what happened after this—your injury that morning, what became of you?

A. Well, they took me to the hospital.

Q. What hospital?

A. Sacred Heart Hospital, in Allentown.

Q. Yes.

A. And I don't know what was done. They didn't take the foot off right away, but I guess what they call first-aid, I don't know, they tried to save the foot, anyhow.

Q. Well, what was the matter with your foot?

A. It was all mashed in the front part.

Q. And how long were you at the Sacred Heart Hospital?

A. Why, I was up—I was on the Sacred Heart Hospital from December 31, 1936 until April 22, 1937. During that time I—well, on January 9th they finally took the foot off—or was it the 8th? I ain't sure of that.

Q. Well, what year?

A. 1937.

Q. Well, did you have—did you have any operations? Did they have—

A. January 7th—8th—I think it was January 8th.

Q. Well, 1937?

A. 1937, they took the foot off, part of the foot. I only had the heel left. I was in the hospital until April 22nd.

Q. Yes.

A. Then I was under company doctor care until November the 12th, 1938.

Q. Until what happened?

A. It never healed up. Well, August 3, 1938 the company doctor took me in the Sacred Heart Hospital again for an operation. That is August 3, 1938.

Q. Yes.

A. Last fall I had another operation on the 7th of August, and it didn't work right, not the way they wanted it to work, so I got a skin graft on the 24th of August. I come out on the 12th—12th of November, 1938. I went home and showed—they told me I had no—don't need any more physical attendance, so I went home to my family doctor and he took me up to Dr. Muschlitz, about two weeks after, after the thing had opened all up again, Dr. Muschlitz, in Allentown, and he sent me in the hospital on December 13th, operated on the 15th, and I came home the evening before Christmas, December 24th.

Q. 19—what year?

A. 1938.

Q. What hospital were you for that last operation?

A. The last operation I had in Allentown Hospital.

Q. The Allentown Hospital?

A. Yes.

Q. Did they amputate any portion of your leg?

A. Yes, they took—they took it off, I think about—I wouldn't say for sure—about nine inches below the knee, nine inches below the knee is where they took it off (indicating).

Q. Well, how many operations did you have between the time that you were injured and this last one?

A. Four.

Q. Four?

A. With this last one, yes.

Q. Four, on this same leg?

A. Same leg.

Q. As a result of this injury—

A. Yes, sir.

Q. —that you received on the 31st of December, 1936?

A. 1936, yes, sir.

Q. Who were the other doctors that operated upon you?

A. Dr. Hausman, at the Sacred Heart Hospital, done the operation.

Q. Allentown?

A. Allentown, yes.

Q. Did he perform the first three operations?

A. Yes, sir.

Q. And Dr. Muschlitz the last one?

A. Yes, sir.

Q. How old are you, Mr. Breisch?

A. Sixty-three.

Q. Sixty-three. Are you married?

A. Yes, sir.

Q. Have a family?

A. Family of ten children, yes, sir.

MR. FRIEDMAN: If the Court please, that is objected to.

THE COURT: What is that?

MR. FRIEDMAN: That is objected to as incompetent.

THE COURT: Oh, no, the jury are entitled to know the surrounding of the witness. It may have

some slight bearing on his credibility, I don't know.

BY MR. GERNERD:

Q. And what were you earning, what was your average earning on or about the 31st of December, 1936?

A. Oh, about forty dollars a week,—yes.

Q. Forty dollars a week?

A. An average, year-round, yes.

Q. And is railroading the only occupation that you followed?

A. Yes, sir, ever since 1897.

Q. What was your state of health before the 31st of December, 1936?

A. I wish it was—it was fine.

Q. What?

A. It was fine. I wish it was like that now.

Q. Have you been able to do anything since that accident? Have you earned anything?

A. No, sir, not a penny. I was in the hospital most of the time.

Q. Ever since then you have been in the hospital most of the time?

A. Most of the time.

Q. Yes.

A. Been under the doctor's care; physical wreck, you might call it.

Q. Mr. Breisch, did you pay any of the hospital bills or doctor bills?

A. No, I haven't paid—I got a bill, though, of $311 to pay yet. Besides, I haven't Dr. Hausman's bill, whatever the operation was, I ain't got that bill. I paid my last hospital bill all but the operation. Dr. Muschlitz, I didn't pay his yet, $105.

Q. How much?

A. $105.

Q. $105 is Dr. Muschlitz's bill?

A. Yes, that is for—

Q. What did you pay at the Allentown Hospital?

A. Eighty—eighty-six dollars, I think.

MR. GETZ: There is one for thirty-eight, and one for forty-three. They are marked paid.

BY MR. GERNERD:

Q. I show you these—pardon me.

(Bill dated 12-17-1938, to Mr. Howard Breisch, from the Allentown Hospital Association, for $38.00 was marked Exhibit P-4.

Bill dated December 24, 1938, to Mr. Howard E. Breisch, from the Allentown Hospital Association, for $43.00 was marked Exhibit P-5).

THE WITNESS: They were paid.

MR. GERNERD: That is all right.

BY MR. GERNERD:

Q. I show you Exhibits P-4 and P-5. Do you recognize those exhibits?

A. Yes, sir, yes.

Q. What are they?

A. Operation.

Q. Well, they are the hospital bills?

A. Yes.

Q. Yes.

A. That is for the ward, where I was in.

Q. Yes, and you paid these?

A. They are paid.

Q. Yes, and is this the bill of the Sacred Heart. I show you—well, now, wait.

(Bill dated November 12, 1938, to Mr. Howard Breisch, from Sacred Heart Hospital, for $311.00, was marked Exhibit P-6.)

BY MR. GERNERD:

Q. I show you Exhibit 6. Will you look at that? What is that? What does that represent, Exhibit 6?

A. Why, this here is the hospital bill. This here is my last one, from August 3rd until—

Q. Well, what hospital?

A. Sacred Heart Hospital.

Q. Sacred Heart Hospital, and how much is that?

A. $311.

Q. $311., and the other two bills, the Allentown Hospital, were $81.?

A. Yes.

(Bill dated April 1, 1939, to Mr. Howard Breisch from Charles H. Muschlitz, M. D., for $105.00., was marked Exhibit P-7.)

BY MR. GERNERD:

Q. I show you Exhibit 7. Will you kindly look at that and tell the jury, Court and jury, what that represents?

A. Well, this here is for the operation.

Q. By whom?

A. Dr. Muschlitz.

Q. What does it amount to?

A. He performed—he performed the operation the Allentown Hospital on December 15th, 1938.

Q. What does it amount to?

A. $105.

Q. $105.?

A. Well worth it!

MR. GERNERD: We offer these exhibits in evidence.

(Copies of Exhibits P-4, P-5, P-6 and P-7 follow):

BY MR. GERNERD:

Q. Mr. Breisch, do you know how it happened that this gondola car became detached from the engine while it was in the act of putting this car upon the scale?

A. I—I don't know, I was going to examine it, but the pain got too great, I couldn't.

Q. In other words,—

A. I didn't know what caused them to break loose, whether it was a worn knuckle, or it might have been a high knuckle.

Q. Well, you don't know?

A. I don't know.

Q. But it had been attached to the engine?

A. You bet, and pulled back.

Q. Yes, and as they were putting it on the scale it detached, is that it?

A. Yes.

Q. And ran away?

A. Ran away.

MR. GERNERD: Cross-examine.

THE COURT: Well, you may conduct your cross-examination after the lunch hour.

Members of the jury, you are relieved until two o'clock. Just resume the seats you now occupy.

I would like to see counsel at side bar a moment.

(Recess, 12:30 until 2 o'clock P .M.)

After Recess

Present: Counsel as before noted.

HOWARD E. BREISCH, recalled.

MR. GERNERD: Cross-examine.

Cross Examination

BY MR. FRIEDMAN:

Q. Mr. Breisch, you live in Coopersburg, is that correct?

A. Yes, sir.

Q. What did you say your age was?

A. 63.

Q. Now, on and just prior to December 31, 1936, you were employed by whom?

A. Central Railroad Company of New Jersey.

Q. By the Central Railroad Company of New Jersey in what capacity?

A. Regular extra conductor.

Q. Regular extra conductor?

A. Yes, sir.

Q. That was in connection with freight trains, was it?

A. Yes, sir.

Q. How long had you worked as an extra conductor?

A. I can't recall just when I got that job. I was a conductor since 1918. I had steady work until the depression come; then I was sent back to braking a while. Then I was emergency extra conductor and brakeman. Then I got the job, I think I had it about a year.

Q. About a Year?

A. About a year or more.

Q. What trick did you work?

A. On this date?

Q. On that date.

A. I was called for 7 A. M.

Q. For 7 A. M., and where did you go?

A. I went to the wire mill.

Q. To the wire mill?

A. American Steel and Wire Mill.

Q. Where did you leave from to go to the Wire Mill?

A. From my home at Coopersburg.

Q. From your home in Coopersburg?

A. Yes, sir.

Q. Did you go directly from your home to the American Steel and Wire Company yard?

A. Certainly.

Q. The American Steel and Wire Company is a private concern, they have their own private yard there where you were working, is that correct?

A. Yes, sir.

Q. They have their own private scale in that yard?

A. Yes, sir.

Q. And that is the scale you have been talking about here in court today?

A. Yes, sir.

Q. What time of the morning did you get to the American Steel and Wire Company yard?

A. I got there right at the scale at about five minutes of seven.

Q. Five minutes of seven?

A. Yes, sir.

Q. Who did you see there?

A. Nobody, no one there.

Q. No one there?

A. No.

Q. Wasn't Mr. Pagel there?

A. Who?

Q. Pagel.

A. I didn't see him. They were in back on the south side of the building with the engine.

Q. Who were you to work with there?

A. With Pagel and McGowan.

Q. With Pagel and McGowan.

A. They were the train crew.

Q. What was Pagel's duties?

A. He was a brakeman.

Q. What was Mr. McGowan's duties?

A. Brakeman.

Q. Who had told you to go to the American Steel and Wire Company?

A. The crew dispatcher at the Allentown yard.

Q. When did he tell you that?

A. About ten minutes of six in the morning.

Q. About ten minutes of six in the morning?

A. Yes, sir.

Q. Where did he tell you that?

A. On the telephone.

Q. Then you went down to the American Steel and Wire Company yard?

A. I caught the 6:15 Philadelphia car to Allentown.

Q. Do they have a yard master at the Steel Mill yard?

A. Yes, sir.

Q. Who is that yard master?

A. Koehler, I think.

Q. Is he here in the room, do you know?

A. Yes, sir.

MR. FRIEDMAN: Mr. Koehler, will you stand up?

(A gentleman stood up in the courtroom.)

BY MR. FRIEDMAN:

Q. Is that the man?

A. Yes, sir.

Q. He is the yard master; had you ever worked in this yard before?

A. Oh, yes.

Q. On how many occasions?

A. Well, I forget just exactly. I had the second trick in there; I don't know, it was during the War time, I can't just exactly say, for four or five months.

Q. And you say that Mr. Koehler was never in that yard?

A. Not at that time.

Q. What do you mean, not at that time?

A. He wasn't yard master at that time.

Q. What time?

A. When I was conducting there regular.

Q. Now, how about December 31st, the morning of the accident?

A. I suppose he was there, but I didn't see him.

Q. Was he in charge just before that?

A. Yes, sir, as far as I know.

Q. And as such, he was in complete charge of the yard, and gave directions what you were to do, is that correct?

A. Yes, sir.

Q. You received and took your directions from Mr. Koehler, is that correct or incorrect?

A. Not this morning.

Q. I say when you went to work there in the yard on other mornings.

A. Yes, sure.

Q. You had been told that you were to work with Mr. Pagel and Mr. McGowan?

A. I was called to conduct the engine.

Q. You were called to conduct a train on which Mr. Pagel and Mr. McGowan would work?

A. Yes, sir.

Q. When you got to the mill, where McGowan and Pagel there ahead of you?

A. Yes, they were ahead of me because they done some work that I don't know where they got their orders from, on the south side of the building.

Q. You don't know where they got their orders?

A. I don't know where they got their orders.

Q. Do you know what work they were doing?

A. No, sir, it was not on that slip that I seen. Of course, it might have been on, I don't know, I didn't read the slip altogether; that is, the latter part. It might have been on the latter part of it, I don't know.

Q. You are talking about the slip you mentioned earlier in the morning?

A. Yes, sir.

Q. Where did you first meet up with Mr. Pagel and Mr. McGowan?

A. The engine came from the south side of the building to the east end of the yard.

Q. Did they come over to where you were?

A. Yes, sir; they just come down, and I ran over to meet them.

Q. You went over to meet them?

A. Yes, sir.

Q. Where did you meet them?

A. Right over there, right next to the scale shanty coming down from the south side.

Q. Were they coming on to the scale track or the dead track in front of the scale shanty?

A. Yes, sir.

Q. They had this Reading car 20970, is that right?

A. No, sir, it was standing on the dead track.

Q. What were they on? How did they come over?

A. McGowan went with the engine out to the switch, and Pagel walked across to me.

Q. Pagel walked over toward you in front of the scale shanty?

A. Yes, sir.

Q. And McGowan was with the engine?

A. Yes, sir.

Q. Where was car 20970?

A. On the dead rail on the scale.

Q. Was it on that car that you had been riding when you were hurt?

A. Yes, sir.

Q. Do you know where car 20970 had come from?

A. From Aronsky's Scrap Yard.

Q. Did you bring it over there?

A. No, sir.

Q. Then, of your own knowledge, do you know where that car came from? Not what somebody might have told

you, but what you yourself, might know about that car. Do you know where that car came from?

A. I know from Aronsky's Scrap Yard.

Q. How do you know that?

A. I was told that.

MR. FRIEDMAN: If the Court please, I move to strike that out.

THE COURT: Develop what he means by being told that.

BY THE COURT:

Q. Did it have a regular run, or was this special?

A. It was along in the regular routine of the yard work in the day.

BY MR. FRIEDMAN:

Q. Mr. Breisch, this Reading car was there in the yard of the American Steel and Wire Company when you got there, was it not?

A. Yes, sir.

Q. It was in the yard, it was right in front of the scales, was it not?

A. Yes, sir.

Q. Was it empty or loaded?

A. Loaded with scrap.

Q. When McGowan and Pagel and the drill engine came over, what were your immediate duties with reference to that particular car? What were you to do?

A. Get it off the dead rail and put it on the scale and weigh it.

Q. Did you weigh it? Did it get weighed?

A. No.

Q. The accident happened before you could weigh it?

A. Before we got it weighed.

Q. When you were hurt, that was what you were trying to do, get it on to the live rails for the purpose of weighing it on the scales of the American Steel and Wire

Company, is that correct? That is what you were trying to do?

A. Yes, sir.

Q. Just prior to the accident was this drill engine connected with this Reading car number 20970, before the accident?

A. Before the accident?

Q. Before the accident?

A. No. You mean before the engine was around?

Q. No, after the engine was around and before you were hurt.

A. She was coupled up to it then.

Q. On which end of the Reading car was the engine coupled, the west end or east end?

A. Eastern end.

Q. That would be towards the entrance of the yard of the American Steel and Wire Company?

A. Yes, sir.

Q. And away from what they call the loading platform?

A. Yes, sir.

Q. Who made that coupling, if you know, Mr. Breisch?

A. I ain't so sure about that: I think Pagel made it.

Q. What, if anything, did you help to do in the making of the coupling?

A. I just stood there and looked at it.

Q. You stood there and looked; you mean by that, that you saw Mr. Pagel made the coupling?

A. Yes, sir.

Q. Did you assist in any way?

A. No.

Q. Did you help, also, or adjust the knuckles?

A. No, sir, I stood there and looked at him.

Q. After this coupling was made, what next happened to this Reading car number 20970?

A. We pulled it back—.

Q. Wait a minute, I want this jury to understand when you say back, by that you mean in a westerly direction?

A. Easterly direction.

Q. That would be towards the entrance of the yard and away from the loading platform, as it is called?

A. Yes, sir.

Q. You had the engine taking the car away in an easterly direction, is that correct?

A. Yes, sir.

Q. Was the Reading car at that time attached to any other car?

A. No, sir.

Q. What had become of the other car?

A. What other car?

Q. Was there another box car there?

A. There was no other car there.

Q. What did the engine and the Reading car next do so far as you are concerned?

A. Shoved in on the scales with this car.

Q. Shoved it, you mean it had gone easterly toward the switch?

A. To the east end of the switch—

Q. Mr. Breisch, I suppose to clear the switch—

MR. GERNERD: Give him a chance to explain.

MR. FRIEDMAN: I am giving him all the chance in the world.

MR. GERNERD: No, you are not.

BY MR. FRIEDMAN:

Q. I want you to explain anything you wish.

A. To pull it back beyond the switch that leads in on the scale.

Q. And you had to do that, you had to clear the switch?

A. Yes, sir.

Q. You wanted to get it back, your idea was to get that Reading car back on the scale to weigh the car?

A. Sure.

Q. How far is the switch from the scales, in your opinion?

A. I judge about—from the end of the scale?

Q. Yes, you can take it at the end of the scale.

A. I judge about sixty feet.

Q. Now, then, the engine and the Reading car started to move in a westerly direction?

A. Yes, sir.

Q. How far had they gone before something next happened? How far had they gone in a westerly direction before something next occurred, in your opinion?

A. Oh, about a car length.

Q. Mr. Breisch, I wonder if you mind telling us just what a car length is.

A. 42 to 46 feet.

Q. In other words, you mean the car had gone about 42 to 46 feet in a westerly direction?

A. In a westerly direction, yes.

Q. Then what happened?

A. The car was broke loose.

Q. The car broke loose?

A. Yes.

Q. Just before the car broke loose about how fast were you going?

A. I judge two and a half or three miles an hour.

Q. That is pretty slow, isn't it?

A. Yes.

Q. There is no perceptible grade there, is there?

A. There is a slight grade.

Q. Very slight, isn't it?

A. Yes, slight grade.

Q. How near to the scale house were you when you y this car came loose?

A. I was standing about in the center of the scale.

Q. Then we have it breaking loose in the center of at scale platform, is that correct?

A. When I got on, yes.

Q. Is that where you got on?

A. About the center of the scale, yes.

Q. You got on at the center of the scale; by the way, as it a dry morning or a wet morning?

A. It had been raining pretty hard in the morning hen I went for the trolley, but at the time of the accident had stopped because I had nothing on but a blouse.

Q. Mr. Breisch, when you saw this car travelling loose, that, you mean away from the engine, is that correct?

A. Yes, sir.

Q. How far did it go before you first noticed it was oose?

A. You mean from the time it entered the switch?

Q. No, from the time it got loose when you first noced the car was loose from the engine.

A. Well, I took notice just about when it was about t the point of the switch to come in on the scale. There where I seen the break.

Q. What did you next do when you saw the car was oose?

A. I jumped on the car.

Q. Did you do anything before that, Mr. Breisch?

A. I stood there to take the light weight, and put it back of the number of the car.

Q. That is what you were doing at the time, you were eighing the car, is that right?

A. I was waiting for the car to come in and to take he light weight, and the capacity of the car to give it to he scale master whenever he came around.

Q. What was the first thing that you did, Mr. Breisch,

when you noticed that the Reading car was loose from the engine?

A. Well, knowing that track ran out on to the track where they spot and light load, I made for the car to do what I could to stop it.

Q. Did you try to put any blocks under the car?

A. There was none around there.

Q. Did Mr. Pagel try to put any blocks under the car?

A. Yes, I think Mr. Pagel did try to put blocks under the car.

Q. What did he do?

A. I don't know whether he got any or not.

Q. Did you see him put blocks under the car?

A. I seen him hunting for some.

Q. Did you hunt any?

A. No, sir.

Q. But you saw Mr. Pagel hunting?

A. Yes, sir.

Q. Where did he hunt for blocks?

A. Just around the scale.

Q. Did you see him do that?

A. Yes, sir.

Q. Was that before or after you got on the train?

A. After I got on.

Q. Do you want this jury to understand you were on the train, then, and you turned around, and you saw Mr. Pagel hunting blocks?

A. Well, I could see him do that when I was riding along, as far as that is concerned.

Q. What did you do when you were riding along with the car?

A. Tried to stop it with the hand brake.

Q. In what way?

A. Put the hand brake on.

Q. Was it while you were turning the hand brake you saw Mr. Pagel hunting blocks?

A. I looked once in a while to see how much distance I had, naturally; I didn't just specially look and watch him pick them up; I seen him doing something.

Q. Mr. Breisch, how far was the Reading car from these spotted cars at the time you applied the brakes?

A. At the time I applied the brakes, from the time I had the brakes applied, you mean, until she hit one?

Q. Yes.

A. About three and a half rail lengths.

Q. Three and a half rail lengths?

A. I judge.

Q. From the time you applied the brake until you came to the car that was spotted?

A. Yes.

Q. I wonder if you would be good enough to tell this jury how long a rail length is.

A. Thirty feet.

THE COURT: He told us that, thirty feet.

MR. FRIEDMAN: He told us about a freight car.

THE COURT: No, he told us about a rail length.

BY MR. FRIEDMAN:

Q. How long it is?

A. Thirty feet.

Q. Were you hurt, Mr. Breisch, before the Reading car struck any other object, or afterwards?

A. After it hit the car I went into, after I hit that car, that car ran up against another car being spotted away from the one I hit, and rebounded and throwed me, and I stepped from the drawhead, there was no end sill on that car, I had to either do that or go in under it, and I missed it and went in between.

Q. Mr. Breisch, what was the other car that was struck by this Reading car 20970?

A. There was a loaded car.

Q. Was it a loaded car or a box car?

A. Box car.

Q. Where was that box car?

A. On number 2.

Q. Where was it with reference to the weighing scale? How far west of the weighing scale building was it? First, am I right in saying it was west of the weighing scale building?

A. I would say about 130 feet.

Q. 130 feet west—

A. No, not from the scale—

Q. I am talking about the scale.

A. I took it from the building, I judge about 105 or 10 feet.

Q. From the weighing scale?

A. Yes, from the weighing scale, from the end of the scale.

Q. As a matter of fact, wasn't that car on the dead track of the scale? Was it or was it not?

A. It couldn't be.

Q. Sir?

A. It couldn't be.

Q. Just exactly where was it, Mr. Breisch?

A. I couldn't exactly tell you that, but I know it was—I am sure it was about five foot below that building, the first building behind the trainmen's shanty.

Q. Is that one of the main buildings, Mr. Breisch?

A. Yes, sir.

MR. FRIEDMAN: That's all.

Redirect Examination

BY MR. GERNERD:

Q. Mr. Breisch, Mr. Friedman asked you where this spotted car was standing on the rail number 2 that you

spoke of that the run-a-way car ran into. Point that out to the jury.

A. Well, I don't know, I judge about—

Q. Turn the photograph the other way.

A. I am sure about five foot, I don't know just exactly.

Q. Five foot what?

A. From that corner, maybe more.

Q. Just a moment. The witness speaks about this point on this building (indicating), showing that on Exhibit 1. Mr. Breisch, I show you Exhibit 2; is this the switch that you spoke of where the engine brought up this car 20970 above the weight scale?

A. This weight switch is right here where we entered in (indicating).

Q. Is this the switch you mean above the weight scale?

A. Yes, sir.

Q. This car was put on the scale track?

A. Supposed to be put on there.

Q. Yes, I know; it didn't get there. Do you understand that, folks?

A JUROR: Yes.

MR. GERNERD: That's all.

MR. FRIEDMAN: I would like to recall Mr. Breisch for an additional question.

MR. GERNERD: Sure.

MR. FRIEDMAN: Called for further cross-examination.

THE COURT: Is it just one question?

MR. FRIEDMAN: It may be a few. I am perfectly willing to interrogate him where he is.

MR. GERNERD: Just let him stand in front of you here.

MR. FRIEDMAN: Wouldn't he be more comfortable seated?

MR. GERNERD: I don't know what you want.

MR. FRIEDMAN: I can't tell until I ask him.

MR. GERNERD: I beg your pardon. I want to be helpful.

HOWARD E. BREISCH, recalled.

Recross Examination

BY MR. FRIEDMAN:

Q. Mr. Breisch, you did testify that at the time of the accident and just prior to the accident you were employed by the Central Railroad of New Jersey as an extra conductor, is that right?

A. Regular extra conductor, yes, sir.

Q. Just where did you do your work? Where had you been working, say, for a month previous to the accident?

A. Allentown yard terminal station.

Q. You mean by that, your work was confined in and about the Allentown Terminal Yard?

A. In and about, and road work if it called for road work.

Q. At or about the time of the accident your work was confined in and about Allentown?

A. Yes, sir.

Redirect Examination

BY MR. GERNERD:

Q. At the moment that interstate cars were coming from different sections?

MR. FRIEDMAN: I object to that as immaterial.

MR. GERNERD: Your Honor, he was asked a question by Mr. Friedman—

THE COURT: You were asking him whether or not at the time referred to cars did move in interstate commerce.

MR. GERNERD: Yes, sir.

THE COURT: Is that objected to?

MR. FRIEDMAN: It is, sir.

THE COURT: Objection overruled, exception noted for the defendant.

MR. GERNERD: That is all, Mr. Breisch.

THE COURT: Has he answered it?

BY MR. GERNERD:

Q. What was your answer, Mr. Breisch?

A. Yes, sir.

MR. FRIEDMAN: I want to move at this time that the last answer and question asked of Mr. Breisch by his counsel be stricken from the record.

MR. GERNERD To which we object, of course.

THE COURT: Motion denied, exception to defendant.

MR. GERNERD: If the Court please, at this time the defendant moves for a directed verdict in this case for the following reasons:

First, there can be no recovery under the Federal Employers Liability Act because the Plaintiff has not properly proved that he and the Defendant were engaged in interstate commerce at the time of the accident.

Two, there can be no recovery under the Safety Appliance Acts because Plaintiff has not brought himself within those acts, and his remedy, if any, is under the Pennsylvania Workmen's Compensation Act of 1915 and the supplements and amendments.

Three, that plaintiff has not made out a probable case of negligency on the defendant's part, or failure of the defendant to comply with the Safety Appliance Act, or such freedom from contributory negligency on his own part as would warrant and recovery by the plaintiff in this case.

THE COURT: Motion denied; exception allowed to the defendant.

MR. FRIEDMAN: Does the Court reserve decision?

THE COURT: No, there is nothing to reserve as yet. This case is the ordinary negligence case, and you are bringing into it these special acts of Congress. As far as the case has developed, we have nothing to do with the Acts of Congress. It is a mere suit under the common law doctrine of negligence.

MR. FRIEDMAN: If the Court please, of course, the plaintiff must bring himself within the acts, and comply with the requirements.

THE COURT: You may take any position you please.

MR. FRIEDMAN: Does the Court grant us an exception?

THE COURT: I granted you an exception.

MR. FRIEDMAN: Mr. Koehler:

THE COURT: Mr. Friedman, I call your attention to the fact that you haven't opened to the Jury.

MR. FRIEDMAN: I am not making any opening.

THE COURT: All right. I thought maybe you had overlooked it.

DEFENDANT'S EVIDENCE

OSCAR KOEHLER, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. FRIEDMAN:

Q. Mr. Koehler, where do you live?

A. I live in Allentown.

Q. Allentown, Pennsylvania?

A. Yes, sir.

Q. How long have you lived there?

A. 29 years.

Q. What is your occupation?

A. I hold two positions in the Wire Mill, yard foreman and yard master.

Q. Yard foreman and yard master?

A. It doubled up since the depression.

Q. What is the name of the company that you work for?

A. American Steel and Wire Company.

Q. That is located where?

A. In Allentown.

Q. About how far from the Allentown terminal yard, as it is called, if you know?

A. Oh, I would say about four blocks.

Q. You have railroad tracks in your yard there?

A. Yes, sir.

Q. By the way, the American Steel and Iron Company is a private concern?

A. Yes.

Q. Private manufacturing concern?

A. Yes.

Q. They have railroad tracks in their yard?

A. Yes, sir.

Q. How long have you been employed by this company?

A. 14 years.

Q. What were your duties on and prior to December 31, 1936?

A. Well, for 7 years I was only yard foreman; I am talking about prior to that, and this coming June 1st seven years ago I got the yard master job in connection with my yard foreman job.

Q. You were the yard master on December 31, 1936?

A. Yes, sir.

Q. And prior to that?

A. Yes, sir.

Q. What were your duties as yard master?

A. Move all loaded cars out of the mill by directions from the shipping clerk, then spot empties in as directed by them and asked for, disposing of these cars on a track to later on be delivered to Gordon Street.

Q. You were in charge of the movement of cars in the yard of American Steel and Wire Company on December 31, 1936, and prior thereto?

A. Yes.

Q. Do you remember the morning of December 31, 1936?

A. Yes, sir.

Q. Do you remember this gondola car, Reading number 20970?

A. Very distinctly.

Q. When had that come into the yard?

A. One or two days before, I just don't recall.

Q. After it came in was it unloaded?

A. It was unloaded the same day it got in the yard.

Q. When was it reloaded?

A. I believe that same night.

Q. That would be about when?

A. I would have to go on records to show you that exactly.

Q. You have the record?

A I have the records with me.

Q. Are these your official records?

A. These are the daily records on my desk for my own benefit.

Q. When was the Reading car 20970 reloaded?

A. 20970 was reported to me as loaded from the freight house on the 26th of December.

Q. Did that car remain in your yard until the morning of December 31, 1936?

A. Yes, sir.

Q. Was it loaded on that morning?

A. It was loaded the evening before.

Q. On the early morning of December 31, 1936, was it in the yard of the American Steel and Wire Company in a loaded condition?

A. Yes, sir.

Q. What was to be done that morning with that car?

A. That car was to be delivered on the scale so I could weigh it after I returned from checking the yard.

Q. Where are the scales?

A. The track scales?

Q. Yes.

A. Right on the same track—

Q. In the American Steel and Wire Company's yard?

A. In the yard.

Q. Who is in charge of the weighing?

A. I, myself.

Q. You are, yourself?

A. Yes.

Q. As a matter of fact, after the accident was that car actually weighed?

A. Oh, yes.

Q. That car was loaded for shipment to where, if you know?

A. Pencoyd, Philadelphia.

MR. GERNERD: Now, wait. Of course, if Your Honor please, I object to anything that took place immediately after the accident, or after the accident happened.

THE COURT: All right.

MR. GERNERD: It might have been routed some other way.

THE COURT: For the life of me, I don't catch what difference it makes whether it was Philadelphia or Kalamazoo.

MR. GERNERD: All right, go ahead.

THE COURT: There may be a reason for it developed later; thus far, there has been no reason developed.

BY MR. FRIEDMAN:

Q. Where had that car been loaded for shipment, to where?

A. At the rear of Number 2 track.

Q. In your yard?

A. Yes.

Q. And after it was weighed, where was that car to be shipped loaded?

A. To Pencoyd, Philadelphia.

Q. Pencoyd, Philadelphia; that is in Pennsylvania?

A. In Pennsylvania. By the way, it is a subsidiary of the U. S. Steel, and we were not allowed to ship scrap to any other place..

MR. GERNERD: That is objected to.

BY MR. FRIEDMAN:

Q. Was this car filled with scrap?

THE COURT: Just a moment. There is an objection. What difference does it make?

MR. GERNERD: All right, it is immaterial.

BY MR. FRIEDMAN:

Q. Was this car filled with scrap?

A. Yes, sir.

Q. Who gives the orders in the yard what are to be done with cars?

A. I, myself.

Q. Who gave the orders with reference to Reading car 20970 on the morning of December 31, 1936?

A. I did.

Q. To whom?

A. Fred Pagel and Dink McGowan.

Q. What were the orders you gave with reference to Reading car 20970 on the morning of December 31, 1936?

THE COURT: Was that the runaway car, Mr. Friedman?

MR. FRIEDMAN: Yes.

THE WITNESS: I gave him an order to move a car, I don't know whether it was a car in the boiler house, or a car of Steel; on that I am in the dark, I don't remember that. When I told him that, I said, "When you have that done, get that scrap car on the scales so I can weigh it when I came back," which is usually about an hour and a half.

BY MR. FRIEDMAN:

Q. I believe you already testified that the orders with reference to cars in your yard are given by you.

A. Yes.

Q. Are those orders given orally or in writing?

A. By word of mouth, only.

Q. By word of mouth, only; then there was no so-called drill slip in connection with this car 20970?

A. No; never is in the years I have been there.

Q. By the way, you say you are employed by the American Steel and Wire Company?

A. Yes.

Q. You said there never is a drill slip in connection with it?

A. No. The cars all have to pass my office. The cars have to pass my office empty and loaded; there is no need of it.

Q. Do you know where that car came from?

A. Worcester, Massachusetts, and was loaded with steel in rod form.

Q. And had been unloaded in the yard?

A. And had been unloaded in the yard by my men under my jurisdiction.

Q. On what date?

A. On the date it came in, the 26th.

Q. December 26th, 1936?

A. Yes.

Q. After that it was loaded with scrap to be shipped to Pencoyd, Philadelphia?

A. It was weighed light, and then weighed loaded.

Q. When did you weigh it light?

A. The next morning.

Q. When you say the next morning, you mean prior to December 31st?

A. 27th.

Q. The 27th of December, 1936?

A. Yes.

MR. FRIEDMAN: Cross-examine.

Cross Examination

BY MR. GERNERD:

Q. Will you let me look at that book from which you refreshed your recollection?

A. You bet.

Q. It says Worcester, Mass. That means this car came from Worcester, Massachusetts, into your yard?

A. Yes, steel in rod form.

Q. Mr. Breisch and this man Pagel, and McGowan—were they employed by the American Steel and Wire Company?

A. No.

Q. Was this the engine of the American Steel and Wire Company?

A. No.

Q. Then this was a drill crew in the employ of the Central Railroad of New Jersey?

A. Yes, sir.

Q. And they took their instructions from their superior employers, didn't they?

A. Surely.

Q. Yes. Now, you said that you were gone about an hour and a half that morning after you had told Pagel and McGowan—

A. Pagel is the name.

Q. —to move that car 20970 on the scales, is that right?

A. Yes.

Q. Then you weren't around when this accident happened?

A. No.

Q. And you didn't see Mr. Breisch that morning?

A. No, sir.

Q. Didn't even see him after the accident?

A. No, sir.

Q. In this same yard there are other cars than the American Steel and Wire Company used in that yard and that are unloaded and rerouted?

A. Not in that yard, no.

Q. There are certain scrap yards there?

A. That's not in the Wire Company's yard.

Q. Is it adjoining?

A. Not adjoining, even.

Q. You mean to tell me that Aronsky's Scrap Yard, that the railroad tracks are not adjoining the tracks of the American Steel and Wire Company?

A. No, they don't adjoin.

Q. Then they run parallel in the same yard?

A. No.

Q. I show you Exhibit 2. Is this a part of your yard?

A. Yes, sir, this is our yard, and that is our first track; this is the Lehigh Valley track (indicating).

Q. Running into your yard?

A. No, not from here; it runs in our yard from here (indicating), but not here. This is the Valley main line.

Q. What is this over here? Is there a track over there (indicating)?

A. Yes, these are some of my cars out of the mill, loads and empties standing over here (indicating).

Q. Aren't Aronsky's over there (indicating)?

A. Over here (indicating).

Q. Let the jury see that.

A. Those are my empty and loaded cars out of the plant.

Q. That is a part of the Wire and Steel Company?

A. No, that is the Central Railroad.

Q. But it is in your yard?

A. No, this is our yard over here (indicating).

Q. Only that over there?

A. Yes, sir; we have nothing to do on this side of the Lehigh Valley Track.

Q. You have other cars coming in here to be put over and loaded along side of your buildings?

A. Yes, right in here (indicating); that is our track.

Q. They are brought from this track over here (indicating), over on to your track?

A. Yes.

Q. But you only have one track that you call your own in your yard?

A. No, from that first track back, everything there, om number 2 back, everything is ours, and we have four-en of them.

Q. And other people have cars coming in that area, n't they?

A. No, not in our area.

Q. Then your cars that come in, come from different rts of the country?

A. Yes.

Q. Just as this car came from Massachusetts?

A. Yes.

Q. And they are shipped from your yard into other ates, out to Ohio, Illinois, Texas?

A. Yes, but this very car wasn't shipped there.

Q. Answer my question.

A. Yes, they are shipped to anywhere, to their desti-ation.

Q. You wouldn't know whether there was an order that trainmen's hut or shed for Mr. Breisch?

A. I wouldn't know.

Q. You wouldn't know that?

A. Who else would put it there but me if there was ne there?

Q. From whom Mr. Breisch gets his orders; he is onductor of this train crew.

A. He was that day, but he never seen me.

Q. You weren't there to give him orders?

A. No, nor did I leave any.

Q. How was he going to carry out his duties on that ay when he was called up—

A. He had no orders; Pagel and McGowan had the rders.

Q. Neither one of them were conductor?

A. No.

Q. The conductor of a crew is in charge of that crew?

A. Absolutely.

Q. And the engineer and brakemen take orders from the conductor?

A. Absolutely, and they don't move unless the conductor is there, unless they want to, but they are not that bull-headed.

Q. Mr. Breisch testified that he was called up in the morning at quarter of six to report and take charge of this crew and engine, and when he got there you weren't there?

A. No.

MR. GERNERD: That's all.

THE COURT: Now, counsel, you asked him about the ownership, as I understood it, of the locomotive, and he said nothing about the cars. Did you mean to differentiate?

MR. GERNERD: I thank you, Your Honor.

BY MR. GERNERD:

Q. The locomotive belongs to the Central Railroad of New Jersey?

A. Yes, sir.

Q. To whom did this car belong to?

A. The Reading Railroad Company.

Q. The Reading Railroad Company?

A. As much as I know; it was a Reading car; I don't know who owns it.

Q. It was connected with the Central Railroad?

A. Yes, and the engine done the handling; they brought it in loaded, and took it out from me.

BY THE COURT:

Q. Your concern had no cars of its own?

A. No, we have no engine and no cars.

MR. GERNERD: That's all.

Redirect Examination

BY MR. FRIEDMAN:

Q. Just a moment. I show you a paper which I ask be marked Defendant's Exhibit A—

(A slip pertaining to car number 20970 was marked Defendant's Exhibit A.)

BY MR. FRIEDMAN:

Q. —and ask you if you ever saw that before. Just answer that yes or no.

A. Yes.

Q. Where did you first see that? What is it?

A. In my scale office; that is the scrap car involved.

Q. What car? What number?

A. 20970.

Q. Reading?

A. Reading 20970.

Q. Is that your scale ticket? Is this your signature on that?

A. Yes.

Q. That was weighed when?

A. Light weighed on the 30th of December.

Q. What year?

A. 1936; and heavy weighed December 31, 1936.

Q. After the accident do you know whether that car remained in the yard of the American Steel and Wire Company?

A. It did for an indefinite period; I couldn't tell you for just how long. The Central Railroad Company asked us to hold it in there.

Q. And then you shipped it where, if you did ship it?

A. Pencoyd, Philadelphia.

MR. GERNERD: Objected to.

BY MR. FRIEDMAN:

Q. Who did ship it out?

A. The billing clerks.
Q. To where?
A. Pencoyd.

MR. GERNERD: I object to any testimony to show the place when he testified the car was kept there an indefinite period of time and then shipped. I object to that testimony and ask it be stricken out; and it is not responsive.

MR. FRIEDMAN: I don't know, who would know better than this man?

THE COURT: It is already in evidence; what is the advantage of striking out this particular statement?

MR. GERNERD: All right.

BY MR. FRIEDMAN:

Q. You did say you are in charge of all of the cars in the yard of the American Steel and Wire Company?
A. Yes, sir.

THE COURT: The destination of this car was Pencoyd, Pennsylvania; that is the Pencoyd Company in Pennsylvania?

MR. FRIEDMAN: Yes, sir.

BY MR. FRIEDMAN:

Q. You are the one who gives the orders in the American Steel and Wire Company?
A. Yes.
Q. And you were on there prior to December 31, 1936?
A. Yes, sir.
Q. And you, alone, give those orders?
A. Yes, sir.

MR. FRIEDMAN: That's all.

Recross Examination

BY MR. GERNERD:

Q. When was that destination fixed, if you know?

A. How was that?

Q. When was that car routed to Pencoyd, Pennsylvania, if you know?

A. That I won't give you definite; I don't have that record.

Q. But it was long after the date of the accident?

A. Well, I would say two days; I believe the Central Railroad Company asked us to hold that car in there, the both of them that were involved, for their purpose that you find out here today.

Q. But it was after this accident?

A. Yes.

Redirect Examination

BY MR. FRIEDMAN:

Q. You mean there was an examination made of the car?

A. Yes.

Q. Mr. Koehler, I have an additional question. That Reading car number 20970 did not leave your yard until it left for Pencoyd, is that correct?

A. That's right.

Recross Examination

BY MR. GERNERD:

Q. Just a moment. How many days after this accident, if you know?

A. That I couldn't tell you.

Q. But it was some days after the occurrence of this accident?

A. It was a day or two, I would say.

MR. GERNERD: Allright, that is all.

FRED H. PAGEL, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. FRIEDMAN:

Q. Mr. Pagel, where do you live?

A. Mauch Chunk.

Q. Where do you work?

A. Allentown.

Q. For whom?

A. Central Railroad of New Jersey.

Q. How long have you worked for the railroad?

A. 47 years.

Q. Were you working for them on the morning of December 31, 1936?

A. Yes, sir.

Q. Do you know Mr. Breisch, the plaintiff in this case?

A. Yes, sir.

Q. Do you remember the morning the accident happened?

A. Yes, sir.

Q That was on December 31, 1936. Were you working with Mr. Breisch on that morning?

A. He was there that morning, yes, sir.

Q. You and Mr. Breisch and Mr. McGowan made up one crew who worked in that yard?

A. Yes, sir.

Q. That morning, is that correct?

A. Yes, sir.

Q. Who got there first that morning, you or Mr. Breisch?

A. I got there, me and McGowan got there first.

Q. You and McGowan got there first; did you get any orders that morning with reference to this Reading car 20970?

A. Yes, sir.

Q. Who gave you those orders?

A. Mr. Koehler.

Q. Mr. Koehler, the man who was on the stand ahead of you?

A. Yes, sir.

Q. What time of day was it you got those orders?

A. Oh, I would say about half past six in the morning.

Q. When did Mr. Breisch first join you?

A. He comes in there at 7 o'clock.

Q. What did you do? What did you and Mr. McGowan do with reference to Reading car 20970 on the morning of December 31, 1936?

A. We were supposed to put that on the scale.

Q. For what purpose?

A. To be weighed.

Q. Who gave you those instructions?

A. Mr. Koehler.

Q. Were any other instructions given you before that?

A. We had to spot before that.

Q. You had to spot that other car out of the way?

A. No, sir, we spotted that on another track before we spotted this car.

Q. Do you remember the engine pulling this Reading car easterly towards the entrance of the Wire Mill just before the accident? Do you remember the coupling made with the engine and Reading car 20970.

A. Yes.

Q. Do you know who made that coupling, Mr. Pagel?

A. By Mr. McGowan.

Q. Did you see him make it?

A. No, sir, I wasn't there.

Q. Just before the accident how far east did the engine and the Reading car move to clear the switch?

A. East? We shoved west with that to get it on the scale track.

Q. Before that you moved in an easterly direction, did you not? Did the engine move in an easterly direction before that?

A. Oh, yes. We came down over what they call the lead to get on number 2.

Q. What were you about to do?

A. Get that car on the scale.

Q. You mean the Reading car?

A. Yes, sir.

Q. What must you do in order to get that car on the scale?

A. There are two cars there together. We had to shove it about ten feet to get in on the scale track. When McGowan coupled up, he gave the signal to the engine. I flagged, and made a cut, and he went back and came over on the scale rail.

Q. When the Reading car got loose from the engine did anybody try to put any blocks under it?

A. I don't know.

Q. By the way, was it wet or dry that morning?

A. It was wet.

Q. Were you present when the accident occurred? Did you actually see the accident?

A. I didn't see the accident, but he hollered for blocks, and the brakeman and I were under the Reading car.

Q. What kind of a car was this Reading car?

A. Gondola.

Q. Who was in charge of the yard of the American Steel and Wire Company?

A. Mr. Koehler.

Q. Is he the yard master?

A. Yes, sir.

Q. Is he the one person that gives orders with reference to the movements of cars in that yard?

A. Yes, sir.

Q. You take your orders from him in that yard?

A. Yes, sir.

MR. FRIEDMAN: Cross-examine.

Cross-Examination

BY MR. GERNERD:

Q. What does the conductor have to do with your drill crew? Isn't he in charge of the drill crew?

A. Yes, sir, he is in charge of the drill crew.

Q. Was Mr. Breisch in charge of the drill crew that morning?

A. Yes, sir.

Q. Are you the engineer or fireman?

A. Brakeman.

Q. You are a brakeman?

A. Yes, sir.

Q. You take your orders from the conductor of the crew, don't you?

A. And the yard master, when the conductor isn't there he tells us what to do.

Q. Mr. Breisch was there that morning?

A. Not when Mr. Koehler was there.

Q. No, but he was there when the movement of this car took place?

A. Sure.

MR. GERNERD: That's all.

Redirect Examination

BY MR. FRIEDMAN:

Q. By the way, did you tell Mr. Breisch anything about this Reading car, yourself?

A. No, sir.

MR. FRIEDMAN: That's all.

MR. GERNERD: No questions.

MR. FRIEDMAN: If the Court please, Mr. McGowan cannot be here. We have a doctor's certificate here.

MR. GERNERD: That is all right.

MR. FRIEDMAN: You are not raising any question about Mr. McGowan?

MR. GERNERD: No.

MR. FRIEDMAN: I have a doctor's certificate.

MR. GERNERD: That is all right, we have no objection.

THE COURT: You better put it on the record; just put your stipulation on the record; counsel does not raise any question about it.

MR. FRIEDMAN: It is stipulated and agreed that no objection of any kind is to be raised directly or indirectly because of the absence of Mr. McGowan. We have a doctor's certificate showing he is ill and unable to attend.

MR. GERNERD: We don't raise any objection to that whatsoever.

Before

Hon. Oliver B. Dickinson, J., and a Jury

Philadelphia, Pa., April 27, 1939

SECOND DAY

Present

Fred B. Gernerd, Esq., and David Getz, Esq., representing the Plaintiff.

Henry B. Friedman, Esq., representing the Defendant.

DEFENDANT'S EVIDENCE (Continued)

THE COURT: You may proceed whenever you are ready.

MR. FRIEDMAN: Mr. Kramer, take the stand, please.

EARL T. KRAMER, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. FRIEDMAN:

Q. Mr. Kramer, where do you live?

A. 1030 South 7th Street, Allentown.

Q. How long have you lived in Allentown?

A. Forty-seven years.

Q. Mr. Kramer, by whom are you employed?

A. American Steel and Wire Company, at Allentown.

Q. Allentown, Lehigh County, Pennsylvania?

A. Yes, sir.

Q. How long have you been employed by the American Steel and Wire Company?

A. Twenty-eight years.

Q. You were then, of course, employed by the American Steel and Wire Company on December 31, 1936?

A. Yes, sir.

Q. In what capacity have you been working for the American Steel and Wire Company?

A. I have been working as checker in the shipping department, mailing clerk, and assistant billing clerk.

Q. What was your capacity on and after December 31, 1936?

A. Assistant billing clerk.

Q. Is your office there in that plant?

A. Yes, sir.

Q. Who was the yard master in December 31 for the American Steel and Wire Company?

A. Oscar Koehler.

Q. The gentleman who is here in court?

A. Yes, sir.

Q. I show you a paper, which I asked to be marked Defendant's Exhibit B—

(The shipping order referred to was marked Defendant's Exhibit B for identification.)

BY MR. FRIEDMAN:

Q. Did you ever see that paper before?

A. Yes, sir.

Q. What is that?

A. That is the bill of lading covering the movement of the car load of scrap.

Q. What car number?

A. Reading, 20970.

Q. By whom was that made?

A. I made that up.

Q. And are your initials on it?

A. Yes, sir.

Q. Where are they?

A. "ETK" on the lower left corner.

Q. When was it made up?

A. January 4, 1937, the date indicated.

Q. That is an order to ship Reading car 20970 from The American Steel and Wire Company to where?

A. Pencoyd, Pennsylvania.

Q. Over what road?

A. The Reading Railroad.

Q. Would that be entirely within the State of Pennsylvania?

A. Yes, sir.

Q. That car was filled with what?

A. Scrap iron.

Q. On or around December 31, 1936 was your com-

pany shipping any scrap iron to any place other than Pencoyd?

MR. GERNERD: That is objected to.

THE COURT: I did not get the question.

(The question was repeated by the Reporter.)

THE COURT: I do not see the relevancy—

MR. FRIEDMAN: It is relevant to the question that Mr. Breisch seemed to think he got an order to ship it somewhere else.

THE COURT: To show it was shipped somewhere else?

MR. FRIEDMAN: That is our purpose—to show where it was actually shipped.

THE COURT: I do not think it has any relevancy but—

MR. FRIEDMAN: We think it has for that reason, Your Honor.

THE COURT: I will sustain the objection and give you an exception.

BY MR. FRIEDMAN:

Q. When that Reading car 20970 came into your yard at the American Steel and Wire Company, prior to December 31, 1936, did you issue any other order beside this one, in connection with that car?

A. No, sir.

MR. FRIEDMAN: Cross-examine.

MR. GERNERD: No questions.

MR. FRIEDMAN: That is all, thank you.

EARL A. ZEIGLER, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. FRIEDMAN:

Q. Mr. Zeigler, where do you live?

A. I live at Wescoesville, Route 1.

Q. That is near Allentown?

A. Near Allentown.

Q. By whom are you employed?

A. Central Railroad of New Jersey.

Q. How long have you worked for them?

A. Since August 7, 1916.

Q. You were working for them the latter part of 1936 and the fore part of 1937?

A. Yes, sir.

Q. Where?

A. At Race and Linton Streets, in Allentown.

Q. What office?

A. In the central freight office.

Q. The central freight office. What were your duties in the central freight office?

A. Waybilling clerk.

Q. Waybilling clerk?

A. Yes.

Q. Now, I show you a shipping order of the American Steel and Wire Company in connection with Reading car 20970, and which has already been marked Defendant's Exhibit B, and I ask, Mr. Zeigler, did you ever see that before?

A. Yes, sir.

Q. When?

A. January 4, 1937, 4 P. M.

Q. Did you get that in your official capacity and while working for the company?

MR. GETZ: Just a minute. We desire to interpose an objection for the reason that it is irrelevant. This refers to a document prepared and issued in January, 1937, several days after the alleged incident.

MR. FRIEDMAN: We must show the shipment, where this car went to.

THE COURT: There is no controversy over that?

MR. FRIEDMAN: There is no controversy over that.

MR. GERNERD: There is no question that this car was shipped four days later—

MR. FRIEDMAN: Shipped on January 4 to Pencoyd, Pennsylvania.

MR. GERNERD: And this accident happened December 31, 1936. How can we be bound by something that was done four days later?

THE COURT: We are not discussing that. There is no controversy over the fact that the destination of this car after it was loaded, was Pencoyd, Pennsylvania?

MR. GETZ: After December 31st—where they routed it, there is no controversy about that.

MR. GERNERD: No controversy about that.

THE COURT: There is no use multiplying the proof about that.

MR. FRIEDMAN: I realize that. Then I wish to offer in evidence defendant's exhibit—

(The waybill referred to was marked Defendant's Exhibit C for identification.)

BY MR. FRIEDMAN:

Q. After you got the shipping order, did you make out a freight waybill?

A. Yes, sir.

Q. Was that freight waybill made out under your direction?

A. Yes, sir.

Q. And was that in connection with Reading car 20970?

A. That was the waybill and car traveling car to Pencoyd.

Q. And was the car actually consigned and delivered to Pencoyd, Pennsylvania?

A. Yes, sir.

Q. And it was received at Pencoyd, Pennsylvania, on what date?

A. January 9, 9 A. M.

Q. Of what year?

A. The stamp does not show—it was received in 1937.

Q. And that waybill was issued as a result of the shipping order issued by the American Steel and Wire Company?

A. Yes, sir.

Q. Is that your initial on Defendant's Exhibit B?

A. Yes, sir.

MR. FRIEDMAN: Cross-examine.

Cross Examination

BY MR. GETZ:

Q. Do you know where Pencoyd is?

A. Yes, sir.

Q. Where is that?

A. On the Reading Company, on the outskirts of Philadelphia.

Q. You do not know of your own knowledge whether this car arrived at Pencoyd?

A. Yes, sir, that waybill shows it. That was the waybill that accompanied the car to Pencoyd.

MR. GETZ: That is all.

Redirect Examination

BY MR. FRIEDMAN:

Q. Are the waybills returned to you after the shipment is received at the other end, for instance, this waybill, Defendant's Exhibit C?

A. No, they are not returned.

MR. FRIEDMAN: That is all.

Recross Examination

BY MR. GETZ:

Q. But, there is no question about the fact that this was done in January, 1937?

A. That is the date I received it.

Q. And that is the date that this original bill of lading was prepared?

A. Yes, sir.

MR. GETZ: That is all.

MR. FRIEDMAN: That is all, thank you, sir.

MR. FRIEDMAN: At this time we would like to offer in evidence Defendant's Exhibits A, B, and C.

MR. GETZ: They are objected to. They are documents made several days after the alleged accident.

THE COURT: I do not understand what they are so I cannot tell you—

MR. FRIEDMAN: Exhibit A is the weigh bill of Reading car 20970 made out on December 31st.

THE COURT: Merely to show the shipment?

MR. FRIEDMAN: That is to show the actual weighing of the car.

THE COURT: What value does it have for the jury?

MR. FRIEDMAN: We feel that for our record that is important, if Your Honor please.

THE COURT: All right. What is the other?

MR. FRIEDMAN: Exhibit B is the original shipping order made by Mr. Kramer, the clerk for the American Steel and Wire Company, with reference to this particular car of scrap, Reading car 20970, showing it was shipped over the route of the Reading Company to Pencoyd.

THE COURT: That is merely to show the shipment?

MR. FRIEDMAN: That is right.

THE COURT: And what is the third?

MR. FRIEDMAN: The third is the waybill.

THE COURT: That is to show the shipment?

MR. FRIEDMAN: That is to show the shipment and the receipt of the shipment at Pencoyd.

THE COURT: All right. I do not see the relevancy, but I will admit them and give you an exception.

(Scale ticket card was marked Defendant's Exhibit A, was received in evidence.

The shipping order, marked Defendant's Exhibit B, was received in evidence.

The freight waybill, marked Defendant's Exhibit C, was received in evidence.)

MR. FRIEDMAN: Now, if the Court please, at this time we again move to strike out Plaintiff Breisch's testimony as found in the last part of his direct testimony with reference to his statement about interstate commerce, for the reason that it is incompetent, conjectural, and a conclusion, and not supported or warranted by the facts.

THE COURT: Have you already moved that?

MR. FRIEDMAN: I do not think I have.

THE COURT: You made use of the word "again". If you have already done it, it is no use repeating it. You are doubtful?

MR. FRIEDMAN: I am doubtful.

THE COURT: And want to make sure?

MR. FRIEDMAN: May I have a ruling?

THE COURT: I do not know what the testimony is that you are moving to strike out. You better specify what you are moving to strike out.

MR. FRIEDMAN: Yes, sir. I move to strike out the question and response thereto, as asked by Mr. Gernerd, wherein he asked in redirect examination.

"Q. At the moment that interstate cars were coming from different sections?"

He asked the witness Breisch that. I submit that witness Breisch is not competent to testify on that point.

That calls for a legal conclusion on the part of Mr. Breisch.

THE COURT: And the other motion is what?

MR. FRIEDMAN: I move to strike out Plaintiff Breisch's testimony where reference is made to a memorandum or order purported to have been found by him in the train men's shanty, as I believe it has been referred to, for the reason that this testimony is incompetent—it is secondary—and there was no basis laid for such testimony, and no facts have been shown which can make this testimony binding on the defendant, and there is no evidence that such order or memorandum was issued by or on behalf of the defendant.

THE COURT: Motion to strike out—what have you to say?

MR. GETZ: We feel that is a question of fact for the jury.

THE COURT: Take the reference to the movement of these cars, if I follow it, it means no more than an expression of opinion by Breisch. The statement by Breisch that cars did move in interstate commerce over these tracks. What bearing does it have?

MR. GETZ: And he also stated—

THE COURT: I know, but there is a motion to strike out before us—what importance is it whether it is in or out?

MR. GETZ: It may have a bearing.

THE COURT: On what?

MR. GETZ: On the question of intra and interstate commerce.

THE COURT: I assume there is no doubt that several witnesses testified to it. The Central Railroad of New Jersey operates, at least, between the states of New Jersey and Pennsylvania. What's the use of talking about it? There is no doubt but what it does. But the motion to strike out, are you objecting to it?

MR. GERNERD: Yes.

THE COURT: I will deny the motion and give the other side an exception.

MR. FRIEDMAN: Exception to each of our motions?

THE COURT: They have not answered as to the other.

MR. GERNERD: The memorandum. We object to it, Your Honor.

THE COURT: I will deny the motion to strike out the testimony as to this slip, or whatever you call it, and exception to the defendant.

MR. FRIEDMAN: Now, if the Court please, will the Court take judicial notice of the Pennsylvania Workmen's Compensation law? I have the volume here, (producing same).

THE COURT: We are trying this case under the Pennsylvania law?

MR. FRIEDMAN: Yes, sir.

THE COURT: And we are bound to take notice of it.

MR. FRIEDMAN: I do not want to be left high and dry—

THE COURT: I understand. If you think it is necessary to formally offer it in evidence, make your offer.

MR. FRIEDMAN: Then, if the Court please, I offer in evidence the Pennsylvania Workmen's Compensation Act, 1915, and supplement, P. L. 736.

THE COURT: Give me the part of it—it is a long act. In your judgment, give me the part of it that is pertinent.

MR. FRIEDMAN: Of course, I feel that the entire act, as an act, is pertinent.

THE COURT: I know.

MR. FRIEDMAN: But, the particular reference, article 3.

THE COURT: That you want me to see.

MR. FRIEDMAN: Article 3, section 301, section 303.

THE COURT: Mr. Friedman, probably you can save me the trouble of looking at it if you will tell me what it is.

MR. FRIEDMAN: That is the one that the employee made—

THE COURT: May or must?

MR. FRIEDMAN: That he shall be bound by the Workmen's Compensation Act unless he shall have done certain things.

THE COURT: That is what you might call a negative opposition.

MR. FRIEDMAN: It is really that he takes the provisions of the Act unless he notifies the other party in writing.

THE COURT: That is purely a question of law. I better reserve ruling on it anyhow—

—MR. FRIEDMAN: That is right.

THE COURT: —rather than give an offhand opinion about it.

MR. FRIEDMAN: And in Section 302—

THE COURT: Your point is that the Pennsylvania law has provided a method or means or system of Workmen's Compensation, and every man who is hurt in the employ of another is, in law, taken to have accepted that act unless he gives notice to the contrary?

MR. FRIEDMAN: The act uses the word "conclusively" in Section 302.

THE COURT: Unless he gives notice?

MR. FRIEDMAN: That is right.

THE COURT: I get your point, and we will take the verdict of the jury subject to that point of law.

Now, is there anything in rebuttal?

MR. GERNERD: No, sir.

THE COURT: Go to the jury.

MR. FRIEDMAN: There is something else, in addition if the Court please.

Now, if the Court please, at this time the defendant moves for a dismissal of the complaint, and it again renews its motion for a directed verdict in its favor for the reasons already given at the close of Plaintiff's case, and also for the following reasons:

Plaintiff has failed to establish any cause of action against the defendant.

Plaintiff has failed to establish the cause of action alleged in his complaint.

Plaintiff has failed to establish that there was any negligence on the part of defendant which was the proximate cause of his injury.

Plaintiff's evidence shows that his own negligence contributed to the injuries.

Plaintiff's injuries were the result of his employment, which was open and obvious, and which the plaintiff assumed.

Plaintiff has not proved any facts which would give this Court jurisdiction of the cause of action.

Plaintiff cannot recover under the Federal Employee's Liability Act because he has failed to adequately prove that he and the defendant company were engaged in interstate commerce at the time that he was injured and in connection therewith.

THE COURT: Mr. Friedman, I understand your motion—

MR. FRIEDMAN: I have two more.

THE COURT: —would be to dismiss the complaint. Now, that must be for facts appearing in the complaint, and you have given, among your reasons, several things which grew out of the evidence.

MR. FRIEDMAN: When I made the motion I said "for the reasons already given", and I am now making a motion for directed verdict.

THE COURT: Directed verdict—all right.

MR. FRIEDMAN: There can be no recovery by the

plaintiff under the Safety Appliance Act, because he has not established facts that would bring him within those acts.

There can be no recovery because plaintiff's sole remedy, if any, is under the Workmen's Compensation Act of 1915 and its amendments.

THE COURT: Well, are you ready to go to the jury?

MR. GERNERD: Yes, sir.

MR. FRIEDMAN: As to the Safety Appliance Act, the plaintiff failed to show his engagement in interstate commerce at the time he was injured.

THE COURT: Well, are you ready to go to the jury?

MR. FRIEDMAN: May I have a ruling?

THE COURT: I thought you agreed that the Court should reserve the law defense. I think that is the sensible thing for you to do—for both sides. If you want a ruling I will give you a ruling and—

MR. FRIEDMAN: I would like to have a ruling.

THE COURT: I will reserve the point at this time, and save myself the trouble of looking at the act.

MR. FRIEDMAN: Yes, sir.

THE COURT: Go to the jury.

(Mr. Gernerd argued the plaintiff's case to the jury. Mr. Friedman argued the defendant's case to the jury. Mr. Gernerd argued to the jury in rebuttal.)

V.

CHARGE OF THE COURT

Dickinson, J.

Members of the Jury; I am not altogether sure that you have, or anyone could get a clear idea in this case of what lawyers call the case and defense. I want to try to make clear to you what the question is which you are to decide. It is a matter of common sense and a proposition that I am prone to bring to the attention of the jury that when a jury has anything to decide, a question to answer, we should get clearly in their minds, first, what the question is to which the answer is desired.

Let us see if we can get a clear idea of what this case really is. We have here an employer and an employee. The Central Railroad of New Jersey was the employer. It is answerable, as is every employer, to the law; it has its duty to perform, and if it fails of that duty it is answerable as precisely as any other employer is.

Now, what is the duty of an employer. The duty is to provide the men who work for them with a reasonably safe place and reasonably safe appliance with which their work is to be performed; that is, a safe place in which to work and a safe appliance with which to do their work. If an employer fails in that duty he is answerable for any damages that directly flow therefrom.

So that the question in this case—and this does not differ from any other case—the question in every case is whether or not the employer did fail in that duty, and that is the question that you have before you.

Now, a great deal has been said about a slip. I do not recall that the evidence discloses to you what was on that slip, and if it has any bearing, in your minds, upon the question which you are to decide you are, of course, to attach to it any significance that you think belongs to it. But, so far as I am concerned I do not see that it has any bearing whatever on the real question here.

Now, all cases of negligence, and you understand this is a case, what lawyers call a case of negligence. All cases of that kind divide themselves into three classes and belong to one or the other, or perhaps two of those classes. You have the case of what is called an inevitable accident. Somebody is injured because of a happening for which nobody is to blame, and of course, if no one is to blame the defendant on trial, whoever he or it may be, is not answerable. That is one type of case. You have another type of case in which you are able to find that the injury resulted from negligence, as lawyers call it, or to what in the vernacular we call fault. A finding may be made that the accident was due to the fault of the defendant on trial, and if it is, of course, you have the very easy conclusion, that the defendant is answerable for the consequence of its fault. Now, you have a third type, in which the same injury has been received, under precisely the same circumstances, and the finding is that the injury was due to the fault of both parties concerned. That is, in the trial of the case if it is the fault of both of the plaintiff and the defendant, and, if it is, I say to you what all of you already know that the law of Pennsylvania is that if the party injured—the plaintiff in the case—has himself or herself been guilty of any negligence, or negligence, which in any degree contributed or helped to bring about the injury which he had received, he cannot recover from the defendant, because the law of Pennsylvania is that between what

lawyers call joint tortfeasors—if both are to blame—neither can recover from the other.

It is for you to determine to which of these classifications this case belongs.

The plaintiff urges you that the injury that the plaintiff sustained was due to the fault or negligence of the defendant, and that the negligence consisted of this: That it failed to provide the employee, that is, Breisch, the plaintiff in this case, with a reasonably safe place in which to work and safe appliance to aid him in that work; and that the fault of the defendant was that this car upon which Breisch was working was provided with a defective brake. Now, it is for you to determine whether or not that had anything to do with the bringing about of his injury.

Now, what is the situation. Here is a conductor who saw this car running—using the expression not alone of counsel but, as I recall, of several witnesses,—"running wild". That does not necessarily mean that it was running fast, but it means it was running without anybody directing its movement; it was runring itself, and was running "wild" in that sense. There was no grade, or a very slight grade, at that point, so that the car was moving at a slow rate of speed, estimated at two and one-half to three miles an hour. You can compare that with the ordinary speed of a person walking at a fairly vigorous pace. If they are a vigorous walker they will walk approximately at the rate of four miles an hour. So you know that this car was moving at a less rate than that which a person walking would make use of. So that it was not "wild" in any sense as to the speed and that in itself dangerous. But, there was danger of a collision, and the plaintiff in performance of what he deemed to be his duty jumped upon that car, moving at that slow rate of speed, for the purpose of stopping it in order to avoid the danger of a collision.

That was his evident purpose—he could have had no other. The means of stopping it was the brake. It was a hand brake, and he applied it. You saw him upon the stand. Evidently, an unusually husky individual before he was injured, possessed, as you can see, of ample strength. He had had, I do not recall how many years, but something like thirty-nine years' experience in railroading, a part of which time had been devoted to braking, and you can, of course, infer from that that he understood how to apply a brake, and could properly and skilfully apply it. Now, he applied it, he said, not once, but if it did not work, he applied it a second time—at least a number of times more, and he could not make it work. The result was a collision. That collision threw him off his balance, and hence, the injury that he sustained.

Now, what is the question. Obviously, the question for the jury, and really that is the only controlling question in the case, is whether or not that brake was in a workable condition. That is the question you have to decide.

Now, what is the evidence. The evidence is that Breisch, the plaintiff in this case,—you had him under your observation—you had the opportunity of what in the vernacular is called "sizing him up"; you could determine what type of man he is, and your judgment would react at once to the extent to which you could place credence in his testimony. He told you that that brake did not work.

One witness, and as far as I recall only one witness, for the railroad company has told you that he tested that brake very shortly after this occurrence, and he found the brake in what he described as "one hundred per cent condition". That means it was perfect as a brake, and that it worked and would work. When he was asked to explain how this happened, and his answer—there is only one inference to be drawn from it, and that is, as he viewed it, the plaintiff

in this case was mistaken either in the fact that he did try to apply the brake, or that he applied it so unskilfully that no brake would work. Now, there is a question for you to determine. You have the testimony of the witnesses for the railroad company that that brake was in good condition, "one hundred per cent" condition as he described it, and you have the testimony of Mr. Briesch that he applied that brake, not once, but at least twice, and it would not work. If it would not work and did not work, it was not workable, that is sure; and you have the testimony of the other witness that he tested it, and it was workable. Now, it is for you, as twelve sensible women and men to determine that simple fact: Was that brake in workable condition or was it not. As far as I can see, aside from the question of damages, that is the only question you have to decide in this case.

Now, there is a defense, what we all recognize to be a real defense, which the defendant in this case sets up, and it may be a perfectly good legal defense, and that is this: If a man is injured by the negligence of another, as I have explained to you, he has what the lawyers call a right of action, he has a remedy for his injury, and that remedy is to sue the party who was in fault and recover his damages. The railroad company sets up that under the provisions of a comparatively recent law in Pennsylvania, the plaintiff no longer has that right. He cannot sue for negligence but he must pursue the remedy which is given under the name of, as we all understand it, the Workmen's Compensation law. Now, that, you see, is purely a question of law. We cannot ask you to determine that, and we do not determine it at this time, and we reserve that question, and after your verdict has been received, if it is a verdict for the defendant, why, that is the end of the case; but, if it is a verdict for the plaintiff, it will be taken subject to that question of law,—whether or not the plaintiff has a right to

sue the defendant for negligence, notwithstanding the provisions of the Workmen's Compensation Act.

Something was said in the course of making a motion by counsel for the defendant that the plaintiff in this case was guilty himself of some degree of negligence which contributed to the injury which he had received. That is to say that he himself was at fault. Now, I have already told you that the law of Pennsylvania is that if such is the fact then a plaintiff cannot recover for an injury which is due wholly or in part to his own negligence; and it is for you to determine whether the plaintiff in this case has been guilty of what lawyers call any contributory negligence.

You will recall I asked counsel for the defendant, directing his attention to that feature in the case, and asked him if he cared to explain to the jury in what respect, in his view of it, the plaintiff had been guilty of negligence, but, in the exercise of a judgment which belongs to him he said he did not care to discuss that question. So, you have not had the benefit of any discussion on it. Nevertheless, it is in the case and it is for you to pass upon. For illustration, if this man was standing in a place of safety outside of this car, if he stood there, he would not have been hurt. That is clear enough. In the exercise of what he thought to be his duty he jumped on that slow moving car for the purpose of stopping it,—was he guilty of any fault in doing that? Now, that is one suggestion of possible fault. The other may be, and I do not know because we have not had the benefit of a discussion of it, the other may be that in applying this brake he was reckless, careless or at fault, and in maintaining his position on this car it was through his own fault that he was thrown off by the jolt or of this jar. As I have said, I do not know just what the averment of negligence on his part is, but you are to consider all the facts in this case and if your finding

is that the plaintiff contributed in any degree to the injury which befell him, that is, a fault which contributed to bring about that injury, then he cannot recover. But, of course, if in your judgment he was not guilty of any such fault then that defense goes "by the board".

Now, that leaves in the case the question of damages. I have, of course, had occasion thousands of times to instruct juries upon that question, and I have fallen in the rut or habit of saying to every jury that when you come to a question of figuring in dollars and cents you want to call to your help the best judgment which you possess for there is not time in which level headed judgment is more imperatively required than it is when you are considering a matter of dollars and cents.

Now, the plaintiff is entitled, primarily, to all expenses to which he has been subjected. Of course, that goes without saying and you have evidence of what his expenses were. He is entitled to compensation for the time that he lost as a result of his injury, and you have had evidence as to that. The measure of what money he lost from loss of time is what you find to be his average rate of compensation for his labor. That is to say, you figure as best you can—and you can do that probably without much effort,—what he, in all probability, would have earned had this injury not befallen him, and for the time in which he has been deprived of his leg. He has lost a leg. That is going to affect not only his past or present earning capacity, but affect him in the future. You should take into consideration the man's age. He is about sixty-three years of age, as I understand. He has fully recovered in the surgical sense, that is, after the surgeons have done for him all they can do, and stump of his leg heals to such an extent that he can wear an artificial leg. To what extent will that condition in which he is left—of course, he cannot recover from

it,—that will reduce his earning capacity in the future. Now, you determine that as best you can.

Now, there is another element which juries are not only permitted to consider but which the law commands them really to consider, and that is what is called pain and suffering. Now, as counsel has said to you, and very fairly said to you, and what your own common sense would say to you, you cannot put a dollar mark upon the pain or upon suffering. You cannot say, here is a person who suffered very slight pain and we will put a value of so much upon that, and here is another person who has endured agonizing pain and we will put a higher valuation upon that. You cannot do that, and the law does not require of you impossibilities.

What does the law mean that you are to consider pain and suffering. It means simply this, it may be of practical help to you or it may not be of much help, but it is the best anyone can do for you, that when you are considering the element of damages, the injury that the man sustained, his experience in the hospital, his condition as it is at present, you are to consider that during that time he endured pain and suffering to the extent to which you find it to exist, and you are to take that into consideration in fixing the amount of your damages. You have in mind the fact, if it be such, that the man has sustained pain and suffering and the extent to which it has been visited upon him. And, after all, members of the jury, you see that the appeal comes back to your hard common sense judgment in fixing damages. Do the best with it that you can. Reach a conclusion as to the damages which you think would be fair and just to the plaintiff, if your verdict should be in his favor; and likewise fair and just as far as the defendant is concerned. In other words, fix the amount which meets the approval of the combined judgment of you all.

Now, the points as far as submitted, as far as I have covered them in this charge, and in so far as they are affirmed, they are affirmed; and in so far as they are negatived or modified, they are so negatived or modified and exceptions are allowed to the respective parties.

When your verdict is taken, let me give you a word as to the formalities. You will be asked whether or not you have agreed on your verdict, after you have agreed, of course, and in answer to that, your answer being that you have so agreed, the next question will be, "How do you find; do you find in favor of the plaintiff or for the defendant?" You answer that question accordingly.

If your judgment in this case is that under all the evidence this defendant was guilty of no act of negligence on its part, or if you find that the plaintiff contributed to his own injury, and you find in favor of the defendant, you will say, "We find in favor of the defendant" and you need say no more.

If, on the other hand, your verdict is in favor of the plaintiff, you then say, "We find in favor of the plaintiff and assess the damages at the sum of so much."

And, as I have explained to you, your verdict will be taken subject to the defense set up under the Workmen's Compensation Act, and the Court will pass upon that as a question of law in due course. With that you have nothing to do, and as far as the development of this case is concerned no one knows how that question will be determined in the future. The advantage of your verdict is that if the question is also determined in favor of the plaintiff, we will have your verdict which will end this case. Otherwise, if the Court passed upon that question now and was guilty of error in the way in which he passed on it, it might necessitate trying this whole case over again. So, you see

the practical advantage in taking your verdict subject to the point of law reserved.

You may take the case and dispose of it, after counsel have had an opportunity to except to the charge.

MR. GERNERD: I have no exceptions.

MR. FRIEDMAN: With the permission of the Court I would like to except to the charge of the Court in so far as it failed to affirm the three points submitted on the part of the defendant. Also, in so far as the charge did not take into consideration the plaintiff's theory of the case of the application of the Employer's Liability Act and the Safety Appliance Act with respect to interstate commerce.

THE COURT: I admit my passing over that—perhaps I should explain that to the jury—but, my passing over that is in your favor.

Members of the jury, there has been some suggestion in this case about the question of interstate commerce. I do not know how much you know on that subject but, if you know anything, you know more than anybody else knows. Of course, we know this: that railroads are engaged in, really, as this evidence is this case would warrant you in finding, and is undoubtedly the fact, are engaged both in interstate, as it is called, and intrastate, as it is called, business. In other words, it does business that extends across state lines, and it does business that is wholly within the state lines.

I say to you that under the evidence in this case there is nothing which would justify you in finding that this particular movement of this particular gondola car was a movement in interstate commerce. Under the evidence it was clearly an intrastate movement, so that you have nothing really to do with the question of interstate commerce.

I did not say anything about it because I assumed from the fact that I did not say anything about it that it had nothing to do in the case, but, as counsel very properly called my attention to it, I instruct you that the question of interstate commerce has, under the evidence in this case, nothing to do with it.

Now, you may take the case and dispose of it.

I assume counsel will enter into the usual agreement?

MR. FRIEDMAN: About the taking of the verdict?

THE COURT: I assume that the stenographer may enter the usual stipulation. If the jury should ask for further instructions we will not require counsel to be in attendance, and instructions may be given in the absence of counsel with allowances of exceptions. And, if the Court should not be in session when the jury have agreed on their verdict, in order that the jury may not be called upon to wait, the Clerk may take the verdict with the same effect as if taken in open court.

MR. GETZ: We would like to enter an objection to that portion of the charge to the jury—may I enter an exception to the latter portion of the instructions to the jury, namely, the instruction regarding interstate commerce.

MR. FRIEDMAN: And please note that was taken after the jury left the room.

THE COURT: Oh, Mr. Friedman, oh, now—

MR. FRIEDMAN: If the Court please, I am the one who is going to have the burden in this case, not Mr. Getz.

THE COURT: The jury had not retired when the objection was taken, so that disposes of that.

MR. GETZ: Now, that the jury is out, the defendant contends that the Workmen's Compensation—

THE COURT: That he did not make application, and he cannot do it now because it is too late.

MR. GETZ: But, so far as the Workmen's Compensation case is concerned—

MR. GERNERD: Oh, let it go, do not argue any questions of law now.

(The defendant submitted the following points for charge:

"The learned Trial Judge is respectfully requested to charge the jury as follows:

1. Under all the evidence in this case, your verdict must be for the defendant.

2. Under the law in this case, your verdict must be for the defendant.

3. Under the evidence and the law in this case, your verdict must be for the defendant.

(s) Henry B. Friedman
Atty. for Defendant")

(The jury returned a verdict for the plaintiff in the sum of $12,000.)

STIPULATION

It was agreed and stipulated by and between counsel for the respective parties that if the Court should not be in session when the jury returns with their verdict, the Clerk of the Court may take the verdict with the same force and effect as if it were taken in open court; and that if the jury should return for further instructions, the Court may give the jury further instructions in the absence of counsel, with the allowanace of an exception to each side to what is

said; and that if there are any exhibits or papers which the jury desire to have sent out to them, they may be sent out.

VI.

STIPULATION AS TO TESTIMONY
(Filed Oct. 10, 1939)

It is hereby stipulated and agreed by and between the undersigned that, subject to the approval of the Court, the following portions of the record of the minutes taken at the trial of the cause need not be printed in the transcript of record herein:

1. The exhibits as found on pages 32 to 42, inclusive, of the minutes.
2. The testimony of the witness, Dr. Charles H. Muschlitz.
3. The testimony of the witness, William Sheridan.
4. The testimony of the witness, Thomas J. Roth.
5. The testimony of the witness, Fred J. Gibson.
6. The testimony of the witness, Charles W. Schwarz.
7. The testimony of the witness, J. D. Young.
8. The opening address of counsel for plaintiff.
9. It is also stipulated and agreed that the said witness, William Sheridan and Thomas J. Roth were called as witnesses for the plaintiff and testified to matters concerning defective brakes and couplings in connection with the accident; and that the witnesses, Fred J. Gibson, Charles W. Schwarz, and J. D. Young were called by defendant and also testified as to matters concerning brakes and couplings.

(s) Fred B. Gernerd,
Attorney for Plaintiff.

(s) Henry B. Friedman,
Attorney for Defendant.

September 22, 1939.

VII.

JUDGMENT

(Filed April 27th, 1939)

Before Dickinson, *J.*

And now, to wit: April 27th, 1939, in accordance with the verdict, it is ordered that judgment be and is hereby entered in favor of Plaintiff, Howard E. Breisch and against the Defendant, The Central Railroad Company of New Jersey, in the sum of Twelve Thousand ($12,000.00) Dollars, with costs.

BY THE COURT:

Attest: GILBERT W. LUDWIG,
Deputy Clerk.

VIII.

DEFENDANT'S MOTION FOR JUDGMENT

(Filed May 3, 1939)

And now, May 2, 1939, the defendant, through its attorneys, Aubrey & Friedman, Esqs., moves the Court to have all the evidence, taken at the trial of this case, duly transcribed, certified, and filed so as to become a part of the record; and, having made a timely motion for a directed verdict and having presented a point for binding instructions, and which motion and point were not granted, and the determination of the legal questions thereby raised having been reserved, defendant moves to have the verdict and the judgment, heretofore rendered in favor of the plaintiff, set aside and to have judgment entered in favor of the defendant on the whole record and in accordance with defendant's motion for a directed verdict.

AUBREY & FRIEDMAN,
By: HENRY B. FRIEDMAN,
Attorneys for Defendant.

IX.

OPINION

Sur Rule for Judgment N. O. V. &c.

Argued May 19th, 1939

(Filed June 8th, 1939)

Dickinson, *J.*

Leave was given to submit supplemental Briefs, which we now have.

Care must be taken in a case such as this not to confuse two wholly different things. The risk of confusion arises out of the dual nature of our citizenship and consequent allegiance and subjection of the laws of two sovereigns. This is a unique feature of our form of Government. Nothing like it had before existed. The feature consists in this. The United States is a sovereign State. The several States are likewise sovereign. We are citizens of the United States, and as such owe it allegiance and subjection to its laws. We are likewise citizens of the State in which we reside owing to it like allegiance and subjection to its laws. The before unheard of proposition was that the same person should at one and the same time be the subject of two different sovereigns. How was this possible? The seeming unsuperable obstacle was met, by the framers of our Constitution, by the simple expedient of having each sovereign consent to its subjects becoming also the subjects of the other. The United States and the several States so agreed by the Constitution. This however only half solved the problem. How was a conflict of sovereignty and of laws to

be avoided? This was accomplished by another simple expedient. The United States and each State were recognized to possess and to retain all the powers of independent sovereigns but they, again by the Constitution, agreed upon what sovereign powers the United States should exercise and which the several States should not. The power to regulate interstate commerce was committed to the United States. Its power over it is supreme and exclusive. In the exercise of this power it might pass such a law as is embodied in the Interstate Railroads Act and in the Appliance Act. This much is clear. As the individual citizen is subject to the dual allegiance above outlined, so in actual fact a railroad might be engaged both in interstate and intrastate commerce. It thus became necessary for the juridical power to define the limits within which the interstate power of the United States could constitutionally be exercised. Conceivably it might have been exercised in all cases in which a railroad company was engaged in interstate commerce. The first Act on the subject so provided. It was however held to be unconstitutional because it extended beyond the limits of interstate transactions.

The second Act was upheld because it was so restricted, and it was finally determined that the Acts of Congress applied or did not, according to the fact of whether the particular transaction, with which the case concerned itself, was interstate or intrastate.

New York vs. Bezue, 284 U. S., 415.

It may perhaps be regretted that a great Constitutional question is thus made to turn upon what might be and often is and indeed is the case here, a pin point fact. A carload of freight is transported into a State from a point beyond the State line. It is intended for further shipment to another point within the State, and in the meanwhile is hauled to where its weight can be taken. A man is injured

during the trip to the scales. Is this an interstate or intrastate movement? However the fact finding may be, the adjudged cases have determined for us that Congress may give a new cause of action or modify an old one in interstate transactions, but such laws have no application in intrastate cases.

The question does not arise in the motion before us because the Trial Judge instructed the jury that there was no evidence from which the jury could find that the plaintiff had suffered his injuries while or when engaged in interstate commerce. The cause of action given by the Acts of Congress is in consequence out of the case. An injured plaintiff may however have a good cause of action under the State law although none under the law of the United States. Such is this case. The District Court, as a Court of the United States, have venue jurisdiction to determine the case because of the diversity of citizenship of the parties and the sum in controversy. This means however that the case is to be determined as a State case and by its laws. Has then the plaintiff a cause of action under the law of Pennsylvania? A railroad employee does not cease to be an employee by changing the employment from interstate to intrastate. Defendant may be liable for the consequences of a defective brake. This would be however because of its negligence and not because the use of a defective brake was in violation of a Safety Appliance Act regulating interstate commerce. The two things should not be confused.

It is in effect conceded that the plaintiff would have a cause of action under what we know as the common law. It is urged however that the State of Pennsylvania has taken away from injured employees all right of action for damages for negligence, and has substituted for it a wholly new cause of action given by the Workmen's Compensation Acts. Whether this is true becomes the sole and only question in the cause and to this we limit the discussion. We

have the judicial power to determine this question in favor of the defendant, notwithstanding the verdict for the plaintiff, because we expressly reserved this point.

What answer then does the law of Pennsylvania make to this question?

The argument addressed to us by counsel for the plaintiff obscures the real question by coupling it with the question of a violation of the Acts of Congress. Had the plaintiff been injured while engaged in an interstate movement of the car, the Safety Appliance Acts would undoubtedly apply. Inasmuch however as he was injured in an intrastate movement the Acts of Congress are out of the case except for such bearing as they may have on the question of negligence.

As before stated, it is conceded that the plaintiff has a cause and a right of action under the law of Pennsylvania unless the Workmen's Compensation Acts have taken away the common law right by substituting for it another. This question is, as we have further said, one of Pennsylvania law.

Counsel for the defendant has likewise coupled with his discussion of this question that of the other question of whether one injured in an intrastate transaction could maintain an action based upon the Acts of Congress. This latter question is not in the case because the jury was given binding instructions on this point. The only question, as we have already several times stated, is that outlined as the only question.

The question and the case, turns upon the construction given to the Pennsylvania Act of 1915, P. L. 736. That Act provides that "in every contract of hiring * * * it shall be conclusively presumed that the parties have accepted the (provisions of the Workmen's Compensation Act) and have

agreed to be bound thereby" &c. The Act has been under discussion in a number of Pennsylvania cases and similar Acts in other States have been discussed in cases in the Courts of those States and in the Courts of the United States.

The interpretation given the Acts of other States have not been uniform and perhaps not consistent. They do not directly apply to the Pennsylvania Statute and are helpful only to the extent to which they are an aid to us in construing that Statute. We are bound by the construction given to the Statute by the Pennsylvania Courts.

Counsel for the plaintiff rely upon the case of Miller vs. Reading Co., 292 Pa., 44.

Counsel for the defendant rely upon Gilvary vs. Cuyahoga, 292 U. S., 57; Tipton vs. Atchison, 298 U. S., 141, and a number of Pennsylvania cases. The Gilvary and Tipton cases are of little help to us. They rule that a State may withhold a common law right of action and substitute for it Workmen's Compensation; whether the State has done so is for the Courts of the State to determine and that the Courts of the United States are bound thereby.

Venezia vs. Philadelphia Electric, 317 Pa. 517, may be accepted as illustrative of the Pennsylvania cases cited to us.

These were all domestic cases in which the injured workmen had agreed to accept of the compensation given him by the State Statute, and had a right to it. They settle the law of Pennsylvania to be that when the injured workman has the right to compensation and has agreed to accept it, this is his only remedy.

This reduces the argument in the instant case to a very narrow compass. Here the plaintiff had not agreed to accept compensation, and we do not know that he had the

right to any. He did sustain the relation of employee and employer with the defendant. He is sought to be held however to the provision of the Act because as he did not disclaim agreement he is "conclusively presumed" to have agreed. For ought we know, the contract of employment was made outside of Pennsylvania whose Statutes were unthought of and not binding upon the parties, and the plaintiff had no right to compensation. The Miller case is decisive of this.

We hold that the provisions of the Act do not apply to parties whose contract of employment was entered into outside of the State of Pennsylvania and who have not agreed to pay and accept compensation. The plaintiff does not lose his right of action except only as he has agreed and has been given a substitute right to the compensation provided by the Act. Here he has no right to compensation.

The motion for a new trial and for judgment n. o. v. are both denied, with exception to defendant, and plaintiff may enter judgment on the verdict, with costs.

X.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed July 11, 1939)

Notice is hereby given that the Central Railroad of New Jersey, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the judgment entered in this action on April 27, 1939, and from the Order of Court denying defendant's motion for judgment n. o. v. filed and entered on June 18, 1939.

AUBREY & FRIEDMAN,
By: HENRY B. FRIEDMAN,
Attorneys for Central Railroad of New Jersey.

Dated: July 10, 1939.

XI.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

(Filed Sept. 23, 1939)

The Central Railroad of New Jersey, the appellant in the above case, by its attorneys, Aubrey & Friedman, Esqs., submits the following statement of points which it intends to rely upon on its appeal to the Circuit Court of Appeals:

1. The lower court erred in denying defendant's motion for a directed verdict at the conclusion of plaintiff's case, for the reason that plaintiff and defendant were not engaged in interstate commerce at the time of the accident.

2. The lower court erred in denying plaintiff's motion for a dismissal of the complaint.

3. The lower court erred in denying defendant's motions for a directed verdict and for binding instructions at the conclusion of the case for the reason that neither plaintiff nor defendant were engaged in interstate commerce at the time of the accident and that plaintiff's recovery, if any, must be under the Pennsylvania Workmen's Compensation Act.

4. The lower court erred in denying defendant's motion for judgment n. o. v. and in entering judgment on the verdict, for the reason that there can be no recovery in this case inasmuch as neither plaintiff nor defendant were engaged in interstate commerce at the time of the accident and any recovery would have to be done under the Pennsylvania Workmen's Compensation Act.

AUBREY & FRIEDMAN,
By: (s) HENRY B. FRIEDMAN,
Attorneys for Appellant.

XII.

EXTENSION OF TIME FOR FILING RECORD.

(Filed Aug. 16, 1939)

And now, August 15, 1939, it is agreed between counsel that the time for the filing of the record on appeal and docketing the action shall be and is hereby extended for an additional forty-five (45) days.

AUBREY & FRIEDMAN,
By: HENRY B. FRIEDMAN,
Attorneys for Central Railroad of New Jersey.
FRED B. GERNERD,
Attorney for Plaintiff.

XIII.

STIPULATION AS TO CONTENTS OF RECORD

(Filed Sept. 23, 1939)

It is hereby stipulated and agreed by and between attorneys for appellant and appellee that the transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to the notice of appeal given by appellant, shall include the following and no other papers and exhibits:

1. The Plaintiff's Statement of Claim.
2. The Defendant's Affidavit of Defense.
3. The complete transcript of the testimony, motions, colloquy, and charge of the court made in the trial of the case, except as eliminated by Stipulation between counsel and as heretofore filed.
4. The opinion and order of the court, dated June 8, 1939.
5. The notice of appeal and date of filing.
6. The stipulation and agreement extending the time of appeal and filing of record.
7. Stipulation designating the portions of testimony to be eliminated in the record on appeal.
8. Stipulation designating the contents of the record on appeal.
9. Statement of points relied upon on appeal.

(s) HENRY B. FRIEDMAN,
Attorney for Appellant.

(s) FRED B. GERNERD,
Attorney for Appellee.

September 22, 1939.

XIV.

CLERK'S CERTIFICATE

United States of America,
Eastern District of Pennsylvania, ss:

I, GEORGE BRODBECK, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of Howard E. Breisch vs. The Central Railroad Company of New Jersey, No. 129, Civil Action, as per stipulation filed, a copy of which is hereto attached, the transcript of record in the above entitled cause is to include ... now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia this 9th day of October, A. D. 1939.

GEORGE BRODBECK,
Clerk.

(Seal)

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[fol. 110] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

And afterwards, to wit, the 6th day of December, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 3d day of June, 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 111] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed June 3, 1940

Before Biggs, Clark and Jones, Circuit Judges

BIGGS, Circuit Judge:

The appellee, Breisch, a citizen of Pennsylvania, was injured while employed as a conductor by the appellant, Central Railroad of New Jersey, a corporation of New Jer-

sey. A freight car which was being shifted towards a scales in the yard of American Steel & Wire Company at Allentown, Pennsylvania, broke loose from the drill engine. The appellee jumped on the car and endeavored to stop it by using the hand brake. The brake was defective and the car collided with another, throwing the appellee to the ground, seriously injuring him. It is conceded that the car upon which the appellee was riding was engaged in a wholly intrastate movement. The appellant railroad is clearly a highway in interstate commerce. There was ample evidence upon which the jury could find that the hand brake was [fol. 112] defective. Judgment was rendered for the appellee in a substantial amount. The appeal at bar followed.

Jurisdiction of the cause is based upon diversity of citizenship, the amount in controversy exceeding $3,000.

The complaint alleges that the appellant is liable to the appellee by reason of its negligence in hauling a car not equipped with efficient hand brakes as required by the Act of April 14, 1910, c. 160, Sec. 2, 36 Stat. 298 (45 U. S. C. A. 11). See also U. S. C. Title 45, Secs. 12-16 (45 U. S. C. A. 12-16). The appellant contends that the appellee is not entitled to maintain his action under the Safety Appliance Acts and that his sole remedy lies in the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736. See Sections 302 (a) and 303 (77 P. S. 461, 481). The first section referred to provides in part that it shall be conclusively presumed that the parties to a contract of hiring have accepted the provisions of article three of the Act and have agreed to be bound thereby. Section 303 provides that, "Such agreement shall constitute an acceptance of all the provisions of article 3 of this act, and shall operate as a surrender by the parties thereto of their rights to any fo n or amount of compensation or damages for any injury or death * * *." Article 3 referred to constitutes the elective compensation provisions of the Act. P. L. 736, Art. *III*, Sec. 301, et seq. (77 P. S. 411, et seq.).

As was made plain by Mr. Justice Roberts in the case of Tipton v. Atchison Ry. Co., 298 U. S. 141, 146-148, the Safety Appliance Acts as now constituted apply to all cars used upon railroads which are highways of interstate commerce and the duty thus imposed necessarily supersedes the duty of the employer at common law. Mr. Justice Roberts went on to state, "But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence,

the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states." The origin and application of a right of action in an employee by reason of breach of the Acts rests in the law of the States. [fol. 113] The negligence charged in the case at bar was the appellant's violation of Section 2 of the Act of April 14, 1910. This, however, is only one of the elements which, like any other act of negligence, will go to support the appellee's right of action. It follows therefore that if the Pennsylvania Workmen's Compensation Act supplies the exclusive remedy of the appellee, he may not maintain the action at bar.

Were we determining as an original question whether the Pennsylvania Workmen's Compensation Law supplies the appellee with his sole remedy, we would conclude that it did so for its terms are entirely unambiguous and clearly seem applicable under the circumstances. This question, however, has been considered by the Supreme Court of Pennsylvania, acting seemingly under a misapprehension of the nature of the decision of the Supreme Court of the United States in the case of McMahan v. Montour R. Co., 270 U. S. 628. In the McMahan case in the Supreme Court of Pennsylvania (283 Pa. 274, 276, 128 A. 918) it was held that the remedy for a breach of duty imposed by the Safety Appliance Acts lay in the Pennsylvania Workmen's Compensation Act. The Supreme Court of Pennsylvania held also, however, that the provisions of the Safety Appliance Acts were inapplicable to railroad cars used in intrastate operations of the railroad even though the railroad was a highway of interstate commerce. This is pointed out by Mr. Justice Roberts in the Tipton case, p. 148. Due to an apparent misapprehension of the basis of its reversal by the Supreme Court in McMahan v. Montour R. Co., the Supreme Court of Pennsylvania in Miller v. Reading Company, 292 Pa. 44, 140 A. 618, held that the claim of an injured employee of an interstate railroad was not cognizable under the State Compensation Act if the employee was injured by reason of a defective appliance upon a car engaged in a purely intrastate movement.

The appellant takes the position that the decision in the Miller case is not binding upon us, citing the Tipton case, [fol. 114] as authority for his contention. The Tipton case deals with a situation closely analogous to that at bar. In the case of Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33,

the Supreme Court held that the first Safety Appliance Act had been extended by later legislation to cover equipment used in intrastate transportation upon railroads which were highways of interstate commerce. Two District Courts of Apeal of California misinterpreted this decision. In the case of Walton v. Southern Pacific Co., 8 Cal. App. (2nd) 290, 48 P. (2nd) 108, it was held that the right of an injured employee to recover damages sustained by reason of a violation of the Federal Boiler Inspection Act (U. S. C. Tit. 45, Secs. 22-34), applicable as are the Safety Appliance Acts, did not "* * * extend to the field occupied by the Compensation Act of the State of California (2 Deering's General Laws of California, p. 2276-7) and that the empolyer's contention that the sole remedy of the employee was under the State Compensation Act was untenable. In Ballard v. Sacramento Northern Ry. Co., 126 Cal. App. 486, 14 P. (2nd) 1045, 15 P. (2nd) 793, another District Court of Appeal concluded that the Safety Appliance Acts imposed not only a duty upon the employer, but gave the employee a remedy as well and that to deny him such remedy would be to disregard the provisions of federal law. The Supreme Court of California refused to review either the Walton case or the Ballard case. The Workmen's Compensation Act of California, though differing somewhat in the language of its provisions from the Pennsylvania Workmen's Compensation Law, none the less is similar in substance upon the point sub judice. In the Tipton case Mr. Justice Roberts, referring to Walton and Ballard cases, stated at p. 151, "If these decisions of intermediate Courts of Appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the [California] Compensation Act as having, by its terms, no application in the circumstances, they are binding authority in federal [fol. 115] courts. If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the Compensation Act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts." Mr. Justice Roberts also stated, p. 152, "If we were convinced that the court acted solely upon a construction of the Workmen's Compensation Law, uninfluenced by the decisions following the supposed authority

of the Rigsby case, we should not hesitate to hold United States courts bound by such construction of the state statute. But the terms of the state Compensation Law, and the California decisions construing it, lead us to doubt that this is so.", and "We are not persuaded that if the state courts had thought that California was free to ordain a plan of workmen's compensation in lieu of an action for damages for breach of the duty imposed by the Safety Appliance Acts they would have restricted the scope of the Workmen's Compensation Act as was done in the Ballard and Walton cases. A definite and authoritative decision that its scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts."

In Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 120, the Supreme Court was passing upon a decision of the Court of Appeals of New York which held that the Arbitration Law of New York, enacted April 19, 1920, c. 275, and amended March 1, 1921, c. 14, did not extend to controversies within the admiralty jurisdiction. Mr. Justice Brandeis stated: "But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory construction but because it thought the Federal Constitution required such action." The Supreme Court thereupon reversed the judg- [fol. 116] ment of the Court of Appeals of New York. See also State Industrial Commission v. Nordenholt Corporation, 259 U. S. 263, and Southern Pacific Co. v. Jensen, 244 U. S. 205.

We therefore must determine whether the Supreme Court of Pennsylvania in Miller v. Reading Company was making a judicial construction of the Pennsylvania Workmen's Compensation Act, its applicability to an employee injured in an accident occurring in Pennsylvania, or was in substance construing the Safety Appliance Acts. The Court stated, pp. 47-48, "But the [Compensation] act, carrying with it a presumption of acceptance of its terms, did not interfere with rights acquired by the congressional legislation, which supersedes the law of the state upon matters within its terms." The Court also stated, p. 48, "The argument is made that, though the Workmen's Compensation Law is inapplicable to a case falling within the scope of the Federal Employers' Liability Law, because then interstate commerce is involved, yet the same is not true where the

accident occurs in an intrastate movement, for in such instances the local legislation must fix the relative rights of the master and servant. Congress has seen fit to provide that certain appliances shall be used by railroads engaged in business between the states, or connected with others furnishing such service, and, for the protection of all, the performance of certain duties is made requisite. Recovery may be had by employees, irrespective of the character of their work at the particular moment of injury, when there has been a violation of the requirements as to the use of safety appliances. These rights of the one injured are not affected by the Workmen's Compensation Act, for the same underlying reasons which led to the conclusion that the Federal Employers' Liability Act may notwithstanding be enforced. McMahon v. Montour R. R. Co. supra."

The Court also stated, "The Act of Congress gave to the employee rights not granted under state laws and our courts have frequently sustained proceedings based on the federal statute in question (Sims v. P. R. R. Co., supra, and [fol. 117] cases there cited), and the exercise of this jurisdiction has been approved on appeal to the United States Supreme Court. McMahon v. Montour R. R. Co., supra; Pursglove v. Ry., 285 Pa. 27, 131 A. 477, certiorari denied 270 U. S. 654, 46 S. Ct. 352, 70 L. Ed. 783.", and "Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force. It follows that there was power below to entertain the present proceeding."

In the light of the foregoing we must conclude that the Supreme Court of Pennsylvania reached the conclusion that the Compensation Act did not apply to Miller's case, not as a matter of the statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law. The conclusion reached by the Supreme Court of Pennsylvania constitutes an erroneous

construction of federal statutes and is not binding upon us. The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law.

Nor can we see how the Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 52, subsection (4), 46 P. S. Supp. Sec. 552, requires a different conclusion than that which we have expressed. The act referred to provides, "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language". The statute merely states what has been the [fol. 118] common law of Pennsylvania for some time. See In re Buhl's Estate, 300 Pa. 29, 150 A. 86. The truth of the matter is the Supreme Court of Pennsylvania erroneously construed the scope of the Federal Safety Appliance Acts in Miller v. Reading Co. in 1928. The decision of the Supreme Court of Pennsylvania which was wrong then is still wrong. This might have been unimportant, however, for a decision of the Supreme Court of Pennsylvania when engaged purely in construing a state statute is binding upon us. In the Miller case, however, the Supreme Court of Pennsylvania undertook to construe at least to some degree the application of the Safety Appliance Acts. That this is so we think is made clear by that portion of the opinion in Ross v. Schooley, 257 F. 290, certiorari denied 249 U. S. 615, quoted by the Supreme Court of Pennsylvania in the Miller case. We repeat it here. "It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional right that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employee than of a traveler. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of Schlemmer v. Buffalo, etc., Ry. Co., 205 U. S. 1." The effect of the Tipton case was to invalidate such decisions as Ross v. Schooley

thus rendering untenable the premise of Miller v. Reading Co.

Moreover this quotation from the Miller case becomes peculiarly pertinent in the case at bar when considered in the light of the decision of the Supreme Court of the United States in the recent case of State Tax Commission v. Van Cott, 306 U. S. 511, 514. Mr. Justice Black stated in regard [fol. 119] to a decision of the Supreme Court of Utah as follows: "If the court were only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law. Whatever exemptions the Supreme Court of Utah may find in the terms of this statute, its opinion in the present case only indicates that 'it thought the Federal Constitution (as construed by this Court) required' it to hold respondent not taxable." We consider this language peculiarly apposite to the circumstances presented by the case at bar since we think it is apparent that the Supreme Court of Pennsylvania in the Miller case decided that case upon the assumption that the State of Pennsylvania did not have the power to deny to the injured employee an action at law and make his remedy under the Pennsylvania Workmen's Compensation Act an exclusive remedy.*

Accordingly, the judgment of the court below is reversed and the cause is remanded with directions to enter judgment for the appellant.

[fol. 120] Jones, Circuit Judge, dissenting.

I should affirm the judgment for the plaintiff.

The facts of the case are fully and fairly stated in the majority opinion. Further recital is therefore unnecessary. Also, there is no disagreement that the plaintiff's

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* Cf. 49 Harvard Law Review 456-461; 21 Minnesota Law Review 336-338.

right of action, whatever it may be, depends both in its origin and regulation upon the law of Pennsylvania which governs the rights of the parties. The question is simply as to what constitutes the pertinent law of that state binding upon a federal court.

In circumstances similar in all material respects to those attending the employment of and injury to the plaintiff in the instant case, the Supreme Court of Pennsylvania has held that the injured employee's right of action against his employer for damages for the latter's negligence in the particular circumstances remains in full force and is not superseded by the Workmen's Compensation Law of the State. Miller v. Reading Company, 292 Pa. 44. The majority of this court conclude, however, that the decision of the Supreme Court of Pennsylvania in the Miller case "constitutes an erroneous construction of federal statutes and is not binding upon us". Thus free to ascertain and declare the law of the state independently, the majority hold that "The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law."

The resultant impasse due to these conflicting conclusions constitutes a very effective barrier to the plaintiff. Until the state rule in the Miller case is changed by competent state authority, the plaintiff's claim is not cognizable under the compensation law. Moreover, the year within which such a claim must be filed has long since passed; and, the time for filing a compensation claim is not a mere limitation of action but goes to the jurisdiction of the Compensation Board. Act of June 2, 1915, P. L. 736, as amended, 77 P. S. Supp. 602. Demmel v. Dilworth, 136 Pa. Superior Ct. 37. See also Guy v. Stoecklein [fol. 121] Baking Co., 133 Pa. Superior Ct. 38. While the litigant's failure to pursue his rights timely in the appropriate forum will not be permitted to clothe him with a right which he would not otherwise possess, before we fault the plaintiff for his choice of action or forum, we should make certain that his choice was wrong. Of that, I am by no means convinced, hence, this dissent.

The jurisdiction of the district court does not rest upon a federally conferred right or remedy but was invoked upon the ground of diversity of citizenship with the requisite amount in controversy. The statement of claim plainly discloses that the plaintiff was under no misapprehension

that the Federal Safety Appliance Acts gave him any right of action or that the appellant's breach of the duty which those Acts impose constituted any more than evidence of the employer's negligence. The plaintiff sought federal court jurisdiction for the enforcement of an existing right recognized by the applicable local law. However, as a result of the decision now arrived at by the majority, the plaintiff finds himself without legal means for the redress of a serious injury which he admittedly suffered in the course of his employment through the established negligence of his employer. The jury's verdict concluded the facts in the plaintiff's favor; and no substantial trial error is assigned with respect to the issues of fact.

The majority assert reliance upon the ruling of the Supreme Court in Tipton v. Atchison, Topeka & Santa Fe Ry. Co., 298 U. S. 141. In so doing, it seems to me that the Tipton case is applied to a situation to which that decision is not germane by its own intendment.

In the Tipton case, the Supreme Court rejected, as not being declaratory of the law of California, two decisions by state courts of intermediate appeal, reviews having been refused by the Supreme Court of the state. The reason for the rejection of the California court decisions in the Tipton case was because the state courts, instead of construing the California compensation statute as having [fol. 122] excluded from its purview the claims there involved, erroneously construed federal statutes (Safety Appliance Acts in the one case and Boiler Inspection Act in the other) as affording "a remedy in the nature of an action for damages" which the state statute could not competently supersede. This, of course, was error. While the Safety Appliance Acts do afford an injured employee a ground for complaint for their violation, which he would not otherwise have, they neither provide nor require a remedy for the cause but leave the matter of the remedy to the regulation of the states.

I apprehend the rule to be that, where a state court excludes a claim from the operation of a state statute upon the mistaken notion that a federal statute affords a remedy for the claim, the state decision is not binding upon a federal court, but that, where the state court's exclusion of the claim from the state statute proceeds from that court's interpretation of the legislative intent with respect to the scope of the state statute, the decision in such in-

stance is binding upon a federal court as the decision of a competent state court declaratory of pertinent local law. The thing of importance in the particular circumstances is how the state court arrives at its exclusion of the employee's claim from the state compensation statute. Support for this view, I believe, is to be found not only in the Tipton case but also in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 120.

After reviewing the two California decisions which were rejected in the Tipton case, Mr. Justice Roberts speaking for the Supreme Court, said at p. 151,—

"If these decisions of intermediate courts of appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in federal [fol. 123] courts. If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the compensation act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts."

And, in Red Cross Line v. Atlantic Fruit Co., supra, where a New York Arbitration Act was invoked for the arbitrament of a claim arising under a maritime contract, the contention was advanced that such controversies are within the exclusive jurisdiction of the admiralty courts under the Federal Constitution and the Judicial Code. Accordingly, the New York Court of Appeals, adopting this view, dismissed the arbitration proceeding. In reversing the judgment of the Court of Appeals, Mr. Justice Brandeis, for the Supreme Court, states the argument and the answer at p. 120, as follows,—

"The argument is that the Court of Appeals held, as a matter of statutory construction, that the Arbitration Law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable. * * * If that court had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction,

the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented."

What was thus clearly denominated in the Red Cross Line case as being binding upon a federal court is what I take to be the effect of the decision of the Pennsylvania Supreme Court in the Miller case where the latter court held at, p. 50, that,—

[fol. 124] "Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, expressed or implied, it was agreed should be so disposed of, and as to such cases, jurisdiction of the courts to try and determine is ousted. But *as to demands, not arising from the ordinary relation of employer and employee,* such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force." (Emphasis supplied.)

As the claim in the Miller case arose out of the employer's violation of a duty to its employee which was not incident to "the ordinary relationship of employer and employee", the apparent intent of the state court decision was to exclude the claim from the provisions of the compensation act as not being within the purview of that statute as written. The effect of the state decision is that the legislature, by implying from the acquiescence of the parties a contract for compensation which is presumed from their failure to renounce formally the provisions of the compensation act,[1] did not thereby embrace within such implied contracts claims not arising "from the ordinary relationship of employer and employee", as known to the law of the state; and that, to do so, would require a clearly expressed intent to that end on the part of the legislature. This conclusion of the state court amounts to a judicial interpretation of the legislative intent with respect to the scope of the compensation act and, as such, constitutes a construction of the state statute.

The action of the state court in such regard was the exercise of a power peculiarly within the competency of

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[1] Act of June 2, 1915, P. L. 736, 738, 739, Art. III, Secs. 301 and 302, 77 P. S. §§ 431, 461.

that court,—a power which it exercised in a somewhat similar manner in its construction of the compensation act with respect to a minor's right of action against his employer for damages. As originally written, Art. III, Sec. [fol. 125] 302, of the act provided, inter alia, that "In the employment of minors, article three [the elective compensation provision] shall be presumed to apply, unless the said written notice [renouncing compensation] be given by or to the parent or guardian of the minor".[2] Notwithstanding the sweep of this statutory provision, the Supreme Court of the state ruled that a minor employee's action of trespass for his employer's negligence was not superseded by the compensation act where the minor was employed in violation of a state statute. Lincoln v. National Tube Co., 268 Pa. 504, 506. See also King et ux. v. Darlington Brick & Mining Co., 284 Pa. 277. Later, the legislature by amendment expressly brought the claims of illegally employed minors within the compensation act as we shall see.

The Miller case was decided in 1928. Since then the compensation act has been amended a number of times but at no time has the legislature seen fit to repudiate the intention imputed to it by the state court in the Miller case. In 1937 comprehensive and important amendments of the compensation law were enacted.[3] While the legislature then expressly offset or changed existing law under prior court decisions with respect to the act, and notably the rule as to minors under the decisions above cited,[4] nothing was done to bring within the compensation law the claims of intrastate employees for injuries received through the employer's violation of the Federal Safety Appliance Acts.

Furthermore, legislative confirmation of the intended scope of the compensation law, as limited by the State Supreme Court in the Miller case, does not rest merely upon the implication of fact. It is implied by positive law.

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[2] Act of June 2, 1915, P. L. 736, 739, Art. III, Sec. 302, 77 P. S. § 461.

[3] Amendment of June 4, 1937, P. L. 1552, Sec. 1, etc., 77 P. S., p. 3 et seq.

[4] See the amendments of June 4, 1937, P. L. 1552, § 1, 77 P. S. §§ 28 and 421, whereby the right to contract for compensation and to file a claim is expressly conferred upon a minor even though the employment is in violation of a state statute.

Thus, at the same 1937 session, and prior to the amendments to which reference has just been made, the Pennsylvania legislature enacted a statute prescribing rules for [fol. 126] statutory construction wherein it is provided "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language".[5] What therefore had been the legislative intent in the prior compensation act, as judicially construed, became by statutory adoption the legislative intent with respect to the amended compensation act in its unchanged provisions. Whether the Statutory Construction Act represents a valid exercise of legislative power, we need not inquire. Nor is it of importance that the rule thus statutorily promulgated had been a canon of construction judicially followed in Pennsylvania antecedently. The Statutory Construction Act of 1937 evidences none the less an expression by the legislature of its intended acceptance of the construction of the compensation law by the State Supreme Court with respect to the pertinent statutory provisions which were later reenacted by amendment without material change.[6] The point here made is simply as to the evident legislative intent.

Concededly, the power to say whether claims of intrastate employees for damages due to their employers' violation of the Federal Safety Appliance Acts shall come under the state compensation law lies with the state legislature. The Safety Appliance Acts "leave the genesis and regulation * * * [of an employee's right of action for their breach] to the law of the states". Tipton case at pp. 147 and 148. When, therefore, the Pennsylvania legislature studiously refrained from subjecting such claims to the compensation law by the later amendments to which the legislative intent, as construed in the Miller case, is directly imputed by the legislature through the express medium of the Statutory Construction Act, it seems to me that the

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[5] Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 52, subsection (4), 46 P. S. Supp. § 552.

[6] Compare Secs. 301 and 302 of the Act of June 2, 1915, P. L. 736, 738, 739, with the cognate provisions in the compensation act after the amendment of June 4, 1937, P. L. 1552, Sec. 1, 77 P. S. §§ 431 and 461.

[fol. 127] law of the state is thus determined. And, after all, the legislative intent, when once discovered, controls. In State Tax Commission v. VanCott, 306 U. S. 511, cited by the majority, it does not appear that there was subsequent action by the Utah legislature in apparent confirmation of the state court decision as there was in the instant case by the Pennsylvania legislature following the decision in the Miller case. Hence, the question which this appeal presents was not involved in the VanCott case.

It is true, as the majority of this court point out, the opinion of the Pennsylvania Supreme Court in the Miller case contains statements which indicate that that court thought that the Federal Safety Appliance Acts imply an employee's right of action for their breach which it is the duty of the states to supply or recognize by way of an action at law for damages. While these considerations would have been highly important in other circumstances, they seem to me to be no longer material in view of the action of the legislature, subsequent to the decision in the Miller case, particularly when contrasted with its positive action with respect to the claims of illegally employed minors. Whether or not the Pennsylvania court so mistakenly conceived the effect and requirements of the Safety Appliance Acts, it is none the less true that the Miller case contained what amounted to an independent construction of the state statute, which by reason of subsequent legislative confirmation became the more definite and authoritative. And, it was said in the Tipton case at p. 155 that,—

"A definite and authoritative decision that its [the compensation act's] scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts."

So bound by the law of the state, we should affirm the judgment for the plaintiff. Further changes in the compensation law are appropriately matter for legislative ac-
[fol. 128] tion whereof all persons will be duly advised and thenceforth bound. In such circumstances, claimants will not find, after pursuing a supposed right under state law, that they have been litigating upon the horns of a dilemma by which they have been impaled."

A true Copy:

Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 129] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

October Term, 1939

No. 7179

CENTRAL RAILROAD OF NEW JERSEY, Defendant-Appellant,

vs.

HOWARD E. BREISCH, Plaintiff-Appellee

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause is remanded to the said District Court with directions to enter judgment for the appellant.

Philadelphia, June 3, 1940.

John Biggs, Jr., Circuit Judge.

[Endorsements:] Order Reversing Judgment etc. Received & Filed Jun. 3, 1940. William P. Rowland, Clerk.

[fol. 130] UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, THIRD JUDICIAL CIRCUIT, Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this court in the case of Central Railroad Company of New Jersey, Defendant-Appellant, vs. Howard E. Breisch, Plaintiff-Appellee, No. 7179 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 20th day of August in the year of our Lord one thousand nine hundred and forty and of the Independence of the United States the one hundred and sixty-fifth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

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FILED
AUG 29 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 384

HOWARD E. BREISCH,

Petitioner,

vs.

CENTRAL RAILROAD OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRED B. GERNERD,
DAVID GETZ,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 384

HOWARD E. BREISCH,

Petitioner,

vs.

CENTRAL RAILROAD OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Howard E. Breisch prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on June 3, 1940.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 112 F. (2) 595 (R. 110).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 3, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved.

The pertinent statutes involved are the Federal Safety Appliance Act, Safety Appliance Act of April 14, 1910 (Title 160, Sec. 2, 36 Stat. 298); Pennsylvania Workmen's Compensation Act of 1915, P. L. 736.

Applicable excerpts therefrom will be found in the Appendix.

Question Presented.

An employee of a railroad, which is a highway of interstate commerce, was injured in Pennsylvania as a result of the failure of a safety appliance to operate properly, which injury occurred when the employee was engaged in intrastate commerce. There are decisions of the highest State court in Pennsylvania which permit an employee so injured to bring an action at law.

Did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law and that his sole remedy was to recover compensation under the provisions of the Pennsylvania Workmen's Compensation Act?

Statement of the Case.

Petitioner's complaint alleged that petitioner was injured while in the employ of the Central Railroad Company of New Jersey, a highway of interstate commerce, by reason of a defective handbrake contrary to the provisions of the Federal Safety Appliance Act, and prayed for damages approximately resulting from such defect. In the action in the District Court, the jury brought in a verdict in favor of the plaintiff in the sum of $12,000.00. Motions for a new trial and judgment *n.o.v.* were made by the defendant.

Argument was made upon the motions before the District Court which denied the motions and directed that plaintiff enter judgment on the verdict rendered by the jury with costs.

The Circuit Court of Appeals of the Third District reversed the judgment on the ground that the sole remedy of the petitioner was under the Pennsylvania Workmen's Compensation Law.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In disregarding the decisions of the Pennsylvania Supreme Court;

2. In holding that the Pennsylvania Workmen's Compensation Act was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

Reasons Why Writ Should Be Granted.

I.

The Circuit Court of Appeals decided an important question of local law in conflict with applicable local Pennsylvania Supreme Court decisions.

The Federal Safety Appliance Act leaves the nature and incidents of the remedy to State law. *Tipton* v. *Atchinson, Topeka and Santa Fe Rwy. Co.*, 298 U. S. 141.

The law of Pennsylvania according to decisions of the highest court of the State of Pennsylvania is: an employee of a railroad, which is a highway of interstate commerce, who was injured while engaged in an intrastate movement as a result of safety equipment failing to operate properly can maintain a suit at law for damages.

In the case of *Sims* v. *Penna. R. R. Co.*, 279 Pa. 111, where the same facts existed as are present in the instant case the right of the injured railroad employee to maintain a

suit at law was upheld. Here the Supreme Court of Pennsylvania reviewed the holding of a trial court to the effect the plaintiff was properly non-suited when he could not prove the cars causing the injury were at the time engaged in interstate commerce. The Supreme Court of Pennsylvania held that the proofs made out a prima facie case for injuries sustained in intrastate traffic.

Then followed the case of *Miller* v. *Reading Co.*, 292 Pa. 44, where the court in a case presenting facts similar to the instant case, held that the plaintiff could maintain a suit at law and was not compelled to accept the provisions of the State Workmen's Compensation Act.

The case of *McMahon* v. *Montour*, 270 U. S. 628, likewise permits suit by a plaintiff in an action at law who was injured under the same circumstances as the petitioner was in the instant case.

However, the Circuit Court of the United States for the Third Circuit disregarded the principle which is set forth in the above three cases and held (R. 116) that the remedy of the petitioner was solely within the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law. It must be remembered that the Workmen's Compensation Act was enacted in 1915, nine years before the *Sims* case.

The Circuit Court disregarding entirely the fact that the *Sims* case, *supra*, and the *McMahon* case, *supra*, permitted such suits at law and taking into consideration only the *Miller* case, held (R. 115) that the decision in that case was not binding upon the ground that in the *Miller* case, The Supreme Court of Pennsylvania had erroneously construed the scope of the Federal Safety Appliance Act and had not been engaged purely in construing a State Statute.

However, as Circuit Court Judge Jones points out in his

dissenting opinion (R. 120) the *Miller* case does constitute a decision of the highest court of the State of Pennsylvania, which is binding upon the Federal Courts. It is submitted that the writ should be granted because the Circuit Court was bound to follow the Pennsylvania decisions.

II.

The decision below conflicts with decisions of other Circuit Courts of Appeals.

The decision below conflicts with the case of *Leuthe* v. *Erie R. R. Co.*, 83 F. (2d) 1013, decided May 4, 1936. Here the plaintiff was injured in the State of New York while working on a railroad which was a highway of interstate commerce, while engaged in an intrastate movement because of the failure of a safety equipment to operate properly.

Suit was brought in the District Court which upheld the right of the plaintiff to sue at law (12 F. Supp. 161). The District Court found itself bound by the holding of the New York Court of Errors and Appeals in *Ward* v. *Erie R. R. Co.*, 230 N. Y. 230, a case which is similar to the *Miller* case. The Circuit Court of Appeals for the Second Circuit in a *per curiam* opinion affirmed the judgment of the District Court.

However, the Circuit Court of Appeals for the Third Circuit in the instant case refused to follow the Pennsylvania decisions.

Conclusion.

It is respectfully submitted that this petition should be granted.

FRED B. GERNERD,
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APPENDIX.

I.

Safety Appliance Act.

"It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line, any car subject to the provisions of this chapter not equipped with appliance herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

(April 14, 1910, c. 160, Sec. 2, 36 Stat. 298.)

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IN THE

Supreme Court of the United States

No. 384 October Term, 1940

HOWARD E. BREISCH,
Petitioner

vs.

CENTRAL RAILROAD OF NEW JERSEY,
Respondent

BRIEF FOR PETITIONER

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CENTRAL RAILROAD OF NEW JERSEY

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 112 F. (2) 595 (R. 110).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 3, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In disregarding the decisions of the Pennsylvania Supreme Court;

2. In holding that the Pennsylvania Workmen's Compensation Act was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

QUESTION PRESENTED

Did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law and that his sole remedy was to recover compensation under the provisions of the Pennsylvania Workmen's Compensation Act?

CONCISE STATEMENT OF THE CASE

The Central Railroad of New Jersey, respondent in this action, was on the 31st day of December, 1936, engaged as a common carrier in Interstate Commerce and for many years had in its employ the petitioner, Howard E. Breisch, who on the aforesaid date was engaged for said respondent as an extra freight conductor. He was in charge of a drill crew consisting of a conductor, engineer, fireman and two brakemen, who were engaged in shifting loaded freight cars from certain positions in the yards of the American Steel and Wire Company, at Allentown, Pennsylvania, to be weighed on a weight scale before shipment to various parts of Pennsylvania and to States beyond. That while in the act of shifting a freight car upon the weight scale, the car ran wild, and the plaintiff in an effort to arrest the car, applied the hand-brake of said freight car which refused to operate, causing the runaway car to collide with another freight car on the same track, threw the petitioner off balance inflicting serious personal injuries which resulted in the amputation of his right leg.

The particular car in question which ran wild, was a car that was to be transported within the State of Pennsylvania. This particular car and the operation of the same was regarded by the Court that tried the case, as a distinctly intrastate movement.

The cause of complaint by the petitioner in this action of the respondent, the Central Railroad of New Jersey, was its failure to observe the provisions of the Federal Safety Appliance Act, because the freight car in question was not then and there, immediately at the time of the accident, equipped with a safe and secure appliance,

but on the contrary, was then and there equipped with a defective hand-brake which, when the emergency arose, failed to respond, thereby placing the petitioner in peril and resulted in the injuries complained of.

Petitioner brought his action against the respondent in the United States District Court, the same having been tried before the late Honorable Oliver B. Dickinson, then President Judge of said Court, with the result that the jury brought in a verdict in favor of the petitioner for damages in the sum of $12,000.00. Certain motions were made on the 2nd day of May, 1939, by the respondent to have the judgment set aside, and judgment directed in favor of the petitioner upon the whole record and in accordance with respondent's motion made at the time of trial, which was denied. The case was finally argued upon the motions made by the respondent before the Honorable Judge Dickinson, who in an opinion filed on the 8th day of June, 1938, denied the motions for new trial and judgment n. o. v., and directed that petitioner might enter judgment on the verdict rendered by the jury, with costs.

On April 27, 1939, in accordance with the verdict, the Court ordered that judgment be entered in favor of petitioner, Howard E. Breisch, and against the respondent, the Central Railroad of New Jersey, in the sum of $12,000.00 with costs.

The principal contention by the respondent before the United States District Court was to the effect that the petitioner had no common law remedy in the United States District Court, and that the petitioner was confined solely to the benefits of the Workmen's Compensation Act of the State of Pennsylvania. This contention was overruled, and petitioner's right of action in said Court was sustained in an opinion handed down by Judge Dickinson, as hereinbefore referred to.

The case is free from any error of the rulings of the Court on the question of evidence, or that there was not a violation of the Safety Appliances Act, or any exception to the amount of the verdict when the motions for new trial and judgment n. o. v. were advanced.

A petition for the writ of Certiorari from the United States Circuit Court of Appeals for the Third Circuit was made by Howard E. Breisch, the petitioner, on August 29, 1940, to the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, and brief in support of said petition filed therewith.

The respondent took an appeal from the decision rendered in said proceedings by the Honorable Judge Dickinson on July 11, 1939, to the United States Circuit Court of Appeals for the Third Circuit, which appeal was argued on the 6th day of December, 1939.

The sole question argued before the Circuit Court of Appeals was the same question which had been argued before the United States District Court upon a motion for new trial and judgment n. o. v. On the 3rd day of June, 1940, the United States Circuit Court, for the Third Circuit, handed down a majority opinion reversing the decision of the lower court, the basis of which decision was to the effect that the only action for Howard E. Breisch, the petitioner, was as a claimant by virtue of the benefits of the Pennsylvania Workmen's Compensation Act, and that no common law remedy was available to him because of the injuries complained of in his cause of action. A dissenting opinion by Mr. Justice Alvin Jones, disagreeing with the majority opinion of said Court, was filed, in which he contended that the State of Pennsylvania, through its Court of last resort, to wit, the Supreme Court of Pennsylvania, had interpreted the Pennsylvania Workmen's Compensation Act, and read into said Act an exception to one injur-

ed as the result of a violation of the Safety Appliance Act in an intrastate movement, and that petitioner was clearly within his legal rights when he brought his action in the United States District Court for redress of the injuries which he sustained.

That said writ of Certiorari was granted by the United States Supreme Court on October 21, 1940, for the purpose of reviewing the decision of the United States Circuit Court of Appeals for the Third Circuit.

ARGUMENT

THE LEGISLATURE OF PENNSYLVANIA DID NOT INTEND TO INCLUDE RAILWAY EMPLOYEES AFFECTED BY A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACTS WHEN IT ENACTED THE PENNSYLVANIA WORKMEN'S COMPENSATION ACTS.

The Circuit Court of Appeals in reversing the judgment of the Court below, took the position that the Supreme Court of Pennsylvania, in interpreting the Workmen's Compensation law of the State of Pennsylvania, was in error in being confused in its belief that the Safety Appliance Act provided an exception, implying a remedy at law to one aggrieved by its violation. That because of this confusion in its reasoning, it fell in error, and that since its decision was influenced by a misapprehension of the Supreme Court's interpretation of said Act, its decision cannot be upheld as binding upon this court. We cannot accept this reasoning. We do not admit that the Supreme Court of Pennsylvania was confused. It was well aware of the object and purposes of the Workmen's Compensation Act of Pennsylvania, and that Act nowhere makes any reference to employees engaged in interstate or intrastate employment, nor have any of the amendments to that Act since 1915 made any changes to the Act bearing upon any of the circumstances involved in the present proceedings. Even the recent Act of June 4, 1937, as well as the Act of June 21, 1939, amending and interpreting the Act of 1915, and its amendments, has made no modification that could be interpreted as having any bearing upon this subject.

It is quite significant that the original Act of 1915, Article 2, Section 202, reads as follows:

> "The employer shall be liable for the negligence of all employees while acting within the scope of their employment, including engineers, chauffeurs, miners, mine foremen, fire bosses, mine superintendents, plumbers, officers of vessels and all other employees licensed by the Commonwealth or other government authority, if the employer be allowed by law the right of free selection of such employees from the class of persons thus licensed."

Can it be said that the Legislature which enacted this humane legislation was unmindful of the thousands of railroad employees within the great State of Pennsylvania, that they should fail to mention them in this Act? Nor have they included them or made reference to this class of employees anywhere in the amendments that have since been enacted to this Act. At the time this legislation was passed, the railroad employees were the largest class of employees within the State of Pennsylvania. It is contended that the Legislature of Pennsylvania did not intend to include railroad employees who were engaged in interstate or intrastate movements, unless by their own contract of selection as provided by said Act, they wish to do so. The Legislature meant to preserve to such employees a right of action at law. This is the only reasonable inference that can be attributed to the fact that they are not specifically mentioned in the Act, or any of its amendments. Why should the Legislature specifically name large classes of employees in this very Act, and be silent with regard to the largest class of employees in the State at the time the Act was enacted? When this Act became law in Pennsylvania, the Safety Appliance Act had long since before been in effect. The framers of this Act, as well as the Attorney General of Pennsylvania, who by tradition passes upon all

important legislative acts before they are approved by the Governor of the State, must have known of the purposes and protection that the Act of Congress, through its enactment of the Safety Appliance Act, meant to confer upon the thousands of railroad employees of the State of Pennsylvania, and if this far reaching and revolutionary legislation was also to apply to the railroad employees, why were they not mentioned specifically in this Act? There is no evidence in this case that Breisch and the Central Railroad of New Jersey had entered into an agreement to be bound by the Workmen's Compensation Law of Pennsylvania, nor has there been the slightest intimation throughout the trial of this cause that such an agreement existed, or that such an agreement had been made in the State of Pennsylvania. We must bear in mind that the defendant in this cause is a foreign corporation engaged in interstate commerce, and because of diversity of citizenship, this action was instituted in the United States District Court. If then the framers of this Act and those responsible for its passage, in their wisdom, meant to exclude these employees because of any violation by the employers of the Safety Appliance Act, it is urged that the Supreme Court of Pennsylvania, when similar questions confronted them, based upon facts almost identical with the facts in the present case, gave cognizance to the purposes of the Act and interpreted the Act in the light of the promoters of the legislation.

The Supreme Court of Pennsylvania was not misled or confused. It passed upon two important cases in which it squarely met this issue.

The first case in Pennsylvania touching upon this subject was the case of *Sims vs. Pennsylvania Railroad Company,* 279 Pa., page 111, which involved a violation of the Safety Appliance Act, resulting in the injury of a brakeman because an automatic coupler on a railroad car was defective, causing serious personal injuries to the brake-

man. This was a case of a railroad engaged in interstate commerce, but at the time of the injury, the brakeman was engaged in an intrastate movement of said railroad car. The injured brakeman brought an action in trespass against the Pennsylvania Railroad Company, his employer, in the State of Pennsylvania. The question as to whether or not this plaintiff was relegated to his rights under the Workmen's Compensation Law was never raised, nor did the Supreme Court of Pennsylvania, the Court of last resort, question his right of action at common law.

Then followed the case of *Miller vs. Reading Company,* 292 Pa., page 44; where a brakeman was injured while engaged in intrastate commerce, by reason of a defect in a coupling device, which violated the Safety Appliance Act of Congress. The Court held that the State Court had jurisdiction of his claim against the Railroad Company, which employed him, and it held further that a railroad employee engaged in intrastate commerce and injured by a defective appliance, is not bound to seek redress in a Federal Court, nor can he be compelled to accept the provisions of the State Workmen's Compensation Act of June 2, 1915, and the supplements thereto. This case, as was the Sims case, is on all fours with the facts in the present case.

The Sims case, *supra,* was decided on January 7, 1924 and the Miller case, *supra,* on January 3, 1928, years after adoption of the Workmen's Compensation Act of Pennsylvania. Mr. Justice Roberts in the case of *Tipton v. Atchison, T. & S. F. R. Co.,* 104 A. L. R., page 831, at pages 836 and 837 said:

> "If these decisions of intermediate courts of appeal," (referring to the Walton and Ballard cases) "and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its

terms, no application in the circumstances, they are binding authority in Federal Courts."

Does this not then support the decision of the Supreme Court of Pennsylvania in the Miller case? Judge Dickinson, in his opinion, in overruling the motion for new trial and judgment n. o. v. said:

> "Counsel for the defendant rely upon Gilvary vs. Cuyahoga, 292 U. S., 57; Tipton vs. Atchison, 298 U. S., 141, and a number of Pennsylvania cases. The Gilvary and Tipton cases are of little help to us. They rule that a State may withhold a common law right of action and substitute for it Workmen's Compensation; whether the State has done so is for the Courts of the State to determine and that the Courts of the United States are bound thereby."

Here there was a violation of a Federal statute, which affected the relationship between Breisch and the respondent company, and the Workmen's Compensation law of Pennsylvania did not cover and protect a situation of this kind. Isn't this the view and interpretation of the Supreme Court of Pennsylvania? We assert that it is. Shall Breisch, the petitioner in this action, be made to suffer because he initiated a cause of action, believing in the wisdom and decisions of the highest court of his State, and to deprive him of this constitutional right, when even learned judicial minds now differ as to the reasoning that the Supreme Court of Pennsylvania gave in the Sims and Miller cases, *supra*? The Legislature of Pennsylvania, since 1915, could easily have corrected this error if it meant to include this class of employees, who were or might be affected by the harm involved by a violation of the Federal Appliance Act, by amending the Workmen's Compensation Act and specifically correcting the same, but it has not done so. On May 28, 1937, the Legislature of Pennsylvania passed an

important Act known as the "Statutory Construction Act", No. 282, Volume 1 (1937), page 1019, at page 1024, section 52, sub-division 4, which reads as follows:

> "That when a court of last resort has construed the language used in a law, the legislature in subsequent laws on the same subject matter, intended the same construction to be placed upon such language."

It will be observed that this interesting legislation was enacted while the 1937 amendment to the 1915 Workmen's Compensation Act was being considered, and which was passed by a week later on June 4, 1937. Therefore, we contend that the Legislature, knowing of the Supreme Court's interpretation of the Workmen's Compensation Act of 1915, in its relation to the violation of the Safety Appliance Act, as expressed in the Sims and Miller cases, *supra*, did not wish to disturb that interpretation and desired that exception to remain undisturbed.

This Court must have judicial knowledge of the fact that the thousands of railroad employees in Pennsylvania, and the heads of their Unions are exceedingly alert in protecting the rights of its members, and that unquestionably they knew of the Supreme Court's interpretation of the Workmen's Compensation Act in making an exception in cases involving circumstances like those in the present cause. If they were not content with the wisdom of the interpretation by the Supreme Court of Pennsylvania, their influence would have been irresistible in having an amendment made to the present Workmen's Compensation law.

In this connection we are pleased to call to the Court's attention, that the Supreme Court of Pennsylvania made a very notable and drastic decision affecting the Workmen's Compensation Act of June 2, 1915, P. L. 736-739, because Article 3, Section 302 of that Act, among other things said:

> "In the employment of minors, Article three (the elective compensation provision) shall be presumed to apply unless the said written notice (renouncing compensation) be given by or to the parent or guardian of the minor."

Mr. Justice Simpson, speaking for the Supreme Court of Pennsylvania, in *Lincoln v. National Tube Company*, 268 Pa. 504, held "that the Workmen's Compensation law, does not apply to a minor who is incapable of entering into a contract, and has been employed in violation of an Act of Assembly. A minor so employed can maintain an action of trespass for personal injuries received during the course of his employment." This same Court again speaking through Mr. Justice Simpson in the case of *King et ux. v. Darlington Brick & Mining Co.*, 284 Pa. 277, again reaffirmed the aforesaid principle.

Here then we have an illustration of the Supreme Court of Pennsylvania reading into the Workmen's Compensation Act an excepted right. This decision by the Supreme Court of Pennsylvania rendered in this particular case, was embraced in an amendment to the Workmen's Compensation Act of June 4, 1937, P. L. 1552, Sec. 1.

The Legislature of Pennsylvania made another very important correction to the Workmen's Compensation Act of 1915, in that it gave a minor employed by his parents a right of action against his parents for an injury that he may have received while in the employ of his parents. (Sec. 1, Act of June 4, 1937, P. L. 1552.) With all the many important corrections that the Legislature has made to the Workmen's Compensation Act of 1915, as well as the new provisions which have been added by amendment to said Act, the Legislature did nothing to bring within the Compensation Law, the claims of intrastate employees for injuries received through the employer's violation of the Federal Safety Appliance Act.

There can be but one reasonable deduction, and that is, that the Legislature of Pennsylvania did not intend to include within the purview of the Compensation Law the employees of the railroads, who might be injured as the result of a violation of the Federal Safety Appliance Act.

The Federal Safety Appliance Act of 1893, as amended by the Act of 1903, did not prescribe a remedy in the Act itself. What it did do was to amplify an existing common law right of action. That right of action was a common law remedy, and therefore, one injured as the result of a violation of said Act, had a common law right of action against the employer, either in the State Court or in the United States District Court, in the latter instance depending upon citizenship. So that in Pennsylvania, from 1903 until the passage of the Pennsylvania Workmen's Compensation Act, there was no question as to what remedy the petitioner could employ. That remedy was an action at law, and up until 1915, anyone injured by virtue of a violation of the Federal Safety Appliance Act in Pennsylvania, could employ but one remedial action, and that was an action at law. This Court has held in the Tipton case that it was up to each State to prescribe a right of action for a breach of the Safety Appliance Act.

Here again we are met at the cross-roads. Did the Legislature of Pennsylvania, in 1915, when it passed the Workmen's Compensation Act, take away from the individual who was injured as a result of a violation of the Federal Safety Appliance Act, a right of action at law and substitute therefor the Workmen's Compensation law, or did it give to such an individual an alternative remedy, either to pursue his remedy by an action at law, or pursue his remedy under the provisions of the Workmen's Compensation Act?

We again reassert our conviction that the Workmen's

Compensation Act of Pennsylvania did not take away a right of action at law, but left it to the aggrieved party to pursue either remedy. This he could do by entering into an agreement with his employer to be bound under the Workmen's Compensation Act, and not having done so, he was free, as in this case, to pursue his action at law.

The provisions of the Federal Safety Appliance Act had for its object the protection of the employees of the railroads against injury and death, and to insure greater safety to the travelling public. It is doubted whether the Congress ever passed a more salutary piece of legislation. The imposition of this positive duty upon the railroad employers created a relationship in this respect far different from the ordinary relationship of employer and employee. We must bear in mind the impelling reasons why Congress passed the Safety Appliance Act. Prior to the passing of the Safety Appliance Act, railroad employees were constantly subjected to great hazards, and thousands were physically maimed, and hundreds of others lost their lives, because of the failure of the railroad employers to equip their railroad equipment with efficient and safe devices. Railroading has always been regarded as a highly specialized employment. There were exacting duties imposed upon railroad employees that, because of the nature of the employment and its relation to the safety of the travelling public, made the relationship between employer and employee a totally different one than is known to exist between employer and employee in the general field of employment. In other words, it was a classified employment. It was a field of employment distinct and separate from the ordinary and general employment of employees, and was so known and recognized by everyone.

This fact must have been in the minds of the framers of the Workmen's Compensation Act of Pennsylvania, or they would have specifically mentioned in the Act, rail-

road employees as has already been commented upon earlier in this brief. The Supreme Court in the Miller case, *supra*, recognized this fact, and gave expression in its opinion "but as to demands not arising from ordinary relation of employer and employee, such as the enforcement of rights fixed by Federal statute, their powers remain as if no such State legislation was in force." Mr. Justice Jones in his dissenting opinion *(Central R. R. of N. J. v. Breisch*, 112 Fed. (2) 595), gives emphasis to this reasoning, for he says:

> "As the claim in the Miller case arose out of the employer's violation of a duty to its employee which was not incident to 'the ordinary relationship of employer and employee', the apparent intent of the state court decision was to exclude the claim from the provisions of the compensation act as not being within the purview of that statute as written. The effect of the state decision is that the legislature, by implying from the acquiescence of the parties a contract for compensation which is presumed from their failure to renounce formally the provisions of the compensation act, did not thereby embrace within such implied contracts claims not arising 'from the ordinary relationship of employer and employee', as known to the law of the state; and that, to do so, would require a clearly expressed intent to that end on the part of the legislature. This conclusion of the state court amounts to a judicial interpretation of the legislative intent with respect to the scope of the compensation act, and, as such, constitutes a construction of the state statute."

This is supported by this Court in the Tipton case, for speaking through Mr. Justice Roberts, at page 155, the Court said:

> "A definite and authoritative decision, that its

scope is so limited, and that the appropriate remedy under said law is an action for damages, will, of course, be binding upon Federal Courts."

The same principle was announced in the case of *Red Cross Line v. Atlantic Fruit Company*, 264 U. S. Supreme Court Reports, page 109, speaking through Mr. Justice Brandeis, at page 115, says:

> "The argument is that the Court of Appeals held as a matter of statutory construction that the arbitration law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable, the claim to recover an amount paid under a charter party, as charter hire, is within the admiralty jurisdiction. * * * * If that court had construed the arbitration law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the State statute would bind us, and there would be no occasion to consider the constitutional question presented."

The Supreme Court of Pennsylvania sought the legislative intent of the framers of the Workmen's Compensation Act and interpreted that statute in the light of that intent. That the Supreme Court correctly interpreted the legislative intent is evidenced by the fact that the Legislature when it amended the Workmen's Compensation Act of 1915, in 1937, which was a thorough and extensive correction to the Workmen's Compensation Act of 1915, again was silent upon this subject, and that same Legislature passed the Statutory Construction Act, so that the amendment, by every reasonable implication, accepted the interpretation of the Pennsylvania Workmen's Compensation Act as made by the Supreme Court of Pennsylvania in the Sims and Miller cases, *supra*.

The situation in this case presents a very serious di-

lemma insofar as it affects the petitioner in this case. Here we have a serious judicial controversy as to whether or not the Pennsylvania Supreme Court properly interpreted the Pennsylvania Workmen's Compensation Act in the Miller case, or whether it felt itself impelled, because of the Federal Safety Appliance Act, to read an exception into the Pennsylvania Workmen's Compensation Act, because it thought that the proper construction of the Federal Safety Appliance Act gave to Miller a cause of action in a Court of Law.

If Breisch had started his proceedings in the State Court of Pennsylvania instead of the Federal Court, it is seriously doubted whether this question, as presently advanced in these proceedings, would have prevailed, because the Supreme Court of Pennsylvania has recognized a right of action at law, under circumstances similar to those here involved, and it was not until the Miller case that this question came squarely before the Supreme Court of Pennsylvania for determination, and in that case, the Supreme Court reaffirmed its position that it had taken in several earlier cases. After all, the Supreme Court of Pennsylvania had to consider the legislative intent of the framers of the Workmen's Compensation Law of Pennsylvania. This it did. What tribunal could give the framers of this legislation a truer and more correct interpretation than the Supreme Court of Pennsylvania? Judge Dickinson and Justice Jones accepted its interpretation as the law in Pennsylvania.

Assuming for the purpose of argument, that the Supreme Court of Pennsylvania misinterpreted the Federal Safety Appliance Act, and believed that it gave a right of action, nevertheless, it had to give to the Pennsylvania Workmen's Compensation Act the legislative intent of its framers, and that legislative intent it gave when it held in the Miller case that "demands not arising from the ordinary relation of employer and employee, such as the

enforcement of rights fixed by federal statute, their powers remain as if no such State legislation was in force."

If the Supreme Court was wrong in its interpretation of said Act, as we have stated before, the Legislature had the power to correct this erroneous construction since the decision in the Miller case in 1928. That it did not do so, gives to the decision in the Miller case, a statutory construction in harmony with the legislative intent.

THE PENNSYLVANIA SUPREME COURT DID NOT MISINTERPRET THE DECISION MADE IN THE McMAHAN v. MONTOUR RAILROAD COMPANY CASE BY THE UNITED STATES SUPREME COURT

Did the Supreme Court of Pennsylvania misunderstand the reason for its reversal by the Supreme Court of the United States in the case of *McMahan v. Montour R. Co.*, 270 U. S. 628? We assert it did not. The argument is raised that the Pennsylvania Supreme Court misunderstood the reason for the reversal "due to an apparent misapprehension of the basis of its reversal by the Supreme Court in McMahan v. Montour, the Supreme Court of Pennsylvania in *Miller v. Reading Company*, 292 Pa. 44, 140 A. 618, held that the claim of an injured employee of an interstate railroad was not cognizable under the State Compensation Act if the employee was injured by reason of a defective appliance upon a car engaged in a purely intrastate movement" (Record p. 112). Respondent argued this point in the court below and also in his opposing brief to the petition for certiorari. This is not the first time this question has been before your Honorable Court. It appeared in the Tipton Case (*supra*) at page 148.

What was the issue in the McMahan v. Montour case?

It was this. The Montour Railroad was located entirely within the State of Pennsylvania and "was not a highway of interstate commerce," therefore the sole remedy afforded the injured employee was the Pennsylvania Workmen's Compensation Act. This is the Court's opinion in *McMahan v. Montour R. Co. case*, 73 Pittsburgh Legal Journal 487 (1923). The plaintiff had been nonsuited in the trial court which held that the Safety Appliance Act did not apply because the railroad involved was not a "highway of interstate commerce."

This case, on appeal, came before the Pennsylvania Supreme Court, 283 Pa. 274, which affirmed the lower court's decision; as appears on page 276 thereof as follows:

> "We agree with the court below that the facts proved do not bring plaintiff within the act relied on, and it did not err in denying a right to recover in the present action." The court further said that the "Montour Railroad does not in any sense constitute a highway of interstate commerce nor is it 'connected with' such commerce in a way to make it in effect an interstate line."

Thus it was clearly held by the Pennsylvania courts that the Montour Railroad in question was not a highway of interstate commerce.

The Supreme Court of the United States then reversed the Supreme Court of Pennsylvania in the Montour case (*supra*), by holding that it was a "highway of interstate commerce," and therefore the Safety Appliance Act applied.

Did the Pennsylvania Supreme Court understand the reason for the reversal? It did.

In the Miller case (*supra*) at page 47, the Pennsylvania Supreme Court said that "the Safety Appliance Act protects intrastate traffic on an interstate highway such

as defendant in the present instance was engaged in (*Sims v. P. R. R. Co.*, 279 Pa. 111), and this *is true although the railroad itself is entirely within the boundary of the state, if it has a connecting point with one passing beyond.* (*McMahan v. Montour*, 270 U. S. 628.)

Even the Circuit Court in its opinion fell into error because it believed that the Supreme Court of Pennsylvania thought it was reversed because it held the remedy for the breach of duty imposed by the Safety Appliances Acts lay in the Workmen's Compensation Act, and not because of the question of whether or not it was a highway of interstate commerce. So that when the Miller case came before it, it had to hold the opposite view, namely, that the remedy was not in the Pennsylvania Workmen's Compensation Act, but that it was by reason of the existence of a Federal Statute.

Strange as it may appear, those who assert that the Pennsylvania Supreme Court misunderstood the reason for the reversal by the United States Supreme Court of the Montour case, themselves appear to have acted under a misinterpretation of this court's decision in said case.

Mr. Justice Roberts did. In speaking for this Court in the Tipton case (148) when he said that the Pennsylvania Supreme Court was reversed "because of its erroneous decision that the Federal Acts were inapplicable to the cars used in intrastate operations of the railroad, *although it was a highway of interstate commerce.*"

Even the Circuit Court in this case fell into the same error. The only question before the lower and Pennsylvania Supreme Court, was whether or not the Montour Railroad was a highway of interstate commerce—(It erroneously decided that it was not).

The foregoing analysis clearly supports the contention that the Pennsylvania Supreme Court did not misapprehend the basis of its reversal by the United States Supreme

Court of Pennsylvania of the McMahan v. Montour R. Co., when it decided Miller v. Reading Company. The Circuit Court of Appeals is wrong in believing that it did.

All of this strengthens the contention that the Supreme Court of Pennsylvania in the Miller case (*supra*) gave to the Pennsylvania Workmen's Compensation Act a definite interpretation, free from any misunderstanding of the decision of the Montour case by the United States Supreme Court.

THE CASES CITED BY RESPONDENT IN SUPPORT OF ITS CONTENTION DO NOT AFFECT THE EXISTING LAW OF PENNSYLVANIA INSOFAR AS THE RIGHTS OF THE PETITIONER ARE CONCERNED

In answer to respondent's brief, we assert that the Tipton and Gilvary cases do not control the decision of the present case. They stand for a different proposition. The Tipton case states definitely that a state has a right to substitute a Workmen's Compensation Act for that of a common law right of action, but whether or not that substitution has been made is always a question for the highest Court of that state to determine. The State Court has the right to pass upon the construction of the Workmen's Compensation Act, and if it decides that it is all inclusive, and that no exceptions to that act exist, then naturally, the United States Courts must follow the decision of that State Court, but the Supreme Court of Pennsylvania construed the Workmen's Compensation Act and held that the Compensation Act of Pennsylvania was not the exclusive remedy, but left to the aggrieved party, injured in circumstances like those in the present case, a right of action at law. The Supreme Court in *Tipton v. Atchison,*

T. & S. F. R. Co., 104 A. L. R., page 831 at pages 836 and 837 said:

> "If these decisions of intermediate courts of appeal," (referring to the Walton and Ballard cases) "and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in Federal Courts."

This supports the decision of the Supreme Court in the Miller case.

The Gilvary case held that an election and agreement by an interstate railroad carrier and its employee to be bound by the State Workmen's Compensation Act so as to bar recovery by the employee under the Federal Safety Appliance Act for injuries suffered while engaged in intrastate commerce is not repugnant to the Federal Safety Appliance Act. In this case Gilvary had signed an agreement to be bound by the Workmen's Compensation Act of the State of Ohio. He had made his election, and therefore, was bound thereby. Mr. Justice Butler, said, in speaking for the Supreme Court of the United States, 292 U. S. 57, at pages 61 and 62:

> "The opinion supports our recent construction of these Acts" (Employee Liability Act and the Safety Appliance Acts) "that, while they prescribe the duty, the rights to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.' * * * These acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act."

The Court speaking of the Safety Appliance Acts, said further, at pages 60 and 61:

> "So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent, complementary, additional or otherwise. * * * The imposition of penalties and abrogation of assumption of risk are measures for enforcement.
>
> A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom."

This dictum expressed by Mr. Justice Butler, in no way affects the decision of the Supreme Court of Pennsylvania in granting to employees injured under similar circumstances as that suffered by Breisch, petitioner in this case, a common law right of action.

There is another case which has been cited by respondent, known as *Geraghty vs. Lehigh Valley Railroad*, 83 Fed. (2nd) 738, as being an authority in support of their contention. In that case, the plaintiff was injured in an intrastate movement as an employee of the Lehigh Valley Railroad Company, engaged in interstate commerce, in an intrastate movement. The Circuit Court of Appeals decided that his only remedy was the Workmen's Compensation Act of the State of New Jersey. The State of New Jersey, either by statute or by the decision of its highest appellate court provided for no other remedy, other than the Workmen's Compensation Act of the State. If the Appellate Court of New Jersey had made an exception to the Act and provided for an alternative remedy, we assert that the Circuit Court of Appeals, which was the same Court that affirmed the decision of the Leuthe

case, which, however, had its origin and situs in the State of New York, wherein the Court of Appeals of that state gave to Leuthe a right of recovery, in spite of the Workmen's Compensation Act of that State, would have reached in the Geraghty case, the same conclusion as it did in the Leuthe case.

The respondent also cited the following Pennsylvania cases, in support of their contention. They are the cases of *Venezia, Appellant v. Philadelphia Electric Co.*, 317 Pa. page 557; *Campagna, Appellant v. Ziskind*, 287 Pa. page 403; and *Persing, Appellant v. Citizens Traction Co.*, 294 Pa. page 230. None of these cases involve a defendant engaged in intrastate commerce, or in any way involves the Safety Appliance Act of Congress. They are purely domestic cases. In the Persing case, it was the case of a motor mechanic, working for a trolley company which operated in Oil City, Pennsylvania, and operated exclusively within the State of Pennsylvania. In the Venezia case, the plaintiff was engaged in digging a trench as a laborer for the Philadelphia Electric Company. In the Campagna case, the plaintiff was a stone mason and was engaged at the time as a mason in constructing buildings. Not one of the defendants was engaged in interstate commerce.

Therefore, these cases are inapplicable and can have no bearing upon the solution of the legal proposition involved in the present case. Mr. Justice Sadler wrote the opinion of this Persing case and counsel would have us believe that because the Miller case is cited, that therefore, the Miller case was modified or the position of the Court changed. This is untenable for the reason that the Safety Appliance Act was not involved in that decision. The facts in the Persing case as hereinbefore referred to, involved a street car company. The facts are totally different and there is nothing inconsistent with the Court's decision in the Persing case, and it is perfectly consistent in its ruling.

but it left the Miller case unscathed, so that Breisch, the petitioner, when he brought suit in the United States District Court, in trespass, was within his remedial rights.

IN PENNSYLVANIA, ONE INJURED BY REASON OF THE VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT, HAS THE RIGHT OF REDRESS BY AN ACTION AT LAW.

Such is the law of the State of Pennsylvania today. Therefore, unless the Legislature of Pennsylvania passes an amendment to specifically include all those injured as the result of a violation of the Federal Safety Appliance Act, then the decision of the Supreme Court of Pennsylvania, interpreting the Pennsylvania Workmen's Compensation law in the case of Miller vs. Reading Company *(supra)*, remains the law of this state. Until that interpretation of the Miller case is changed by the Supreme Court of Pennsylvania and that Court decides that the Compensation Act is the exclusive remedy in cases similar to the facts involved in the Breisch case, then until that day has arrived, Breisch, the petitioner in this case, and all others similarly affected, still have in Pennsylvania an alternative remedy.

In the case of *Erie Railroad Company vs. Tompkins*, 114 American Law Reports, Annotated, 1487, the United States Supreme Court, speaking through Mr. Justice Brandeis, said, at page 1492:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Further in his opinion, he said, at page 1493:

> "Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence."

Therefore, we assert that the cases of *Tipton vs. Atchison T. & S. F. R. Co.*, 104 A. L. R. 831, *Gilvary vs. Cuyahoga*, 292 U. S. 57, *Geraghty vs. Lehigh Valley Railroad Company*, 83 Fed. (2) 738, and the *State Tax Commission vs. Van Cott*, 306 U. S. 511, 514, do not control this Court's decision in this case, because the legislature of Pennsylvania did not intend to include railroad employees injured by a violation of the Federal Safety Appliance Acts, as the exclusive remedy under the Pennsylvania Workmen's Compensation Act. Furthermore, the Pennsylvania Supreme Court in the Miller case (*supra*), gave to the Pennsylvania Workmen's Compensation Act, a statutory interpretation of said act in support of the legislative intent of the framers of said legislation.

We, in addition to the arguments advanced in this brief on behalf of the petitioner, assert that the very learned opinions of Judge Dickinson in the Court below, and that of Mr. Justice Jones in his dissenting opinion in the Circuit Court of Appeals for the 3rd Circuit of the United States, correctly interpreted the existing law of Pennsylvania. For the reasons herein assigned, we respectfully ask this Court to reverse the decision of the Circuit Court of Appeals for the 3rd Circuit and affirm the judgment of the Court below.

Respectfully submitted,

FRED B. GERNERD,

DAVID GE[redacted],

Attorneys for Petitioner.

APPENDIX

I.

Safety Appliance Act

"It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line, any car subject to the provisions of this chapter not equipped with appliance herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

(April 14, 1910, c. 160, Sec. 2, 36 Stat. 298.)

Pennsylvania Workmen's Compensation Act

The employer shall be liable for the negligence of all employes, while acting within the scope of their employment, including engineers, chauffeurs, miners, mine-foremen, firebosses, mine superintendents, plumbers, officers of vessels, and all other employes licensed by the Commonwealth or other governmental authority, if the employer be allowed by law the right of free selection of such employes from the class of persons thus licensed; and such employes shall be the agents and representatives of their employers, and their employers shall be responsible for the acts and

neglects of such employes, as in the case of other agents and employes of their employers; and, notwithstanding the employment of such employes, the property in and about which they are employed, and the use and operation thereof, shall at all times be under the supervision, management and control of their employers.

(Act of 1915, dated June 2, 1915, P. L. 736, 737, Sec. 202).

(This Act has been re-enacted by the Act of June 4, 1937, without change).

AMENDMENT TO PENNSYLVANIA WORKMEN'S COMPENSATION ACT OF 1915, AMENDED JUNE 4, 1937, P. L. 1552, SECTION 108, ARTICLE 1.

"For the purpose of this act, minors shall have the same power to contract, file claims for compensation and receive compensation as adult employes, subject, however, to the power of the board, in its discretion, at any time to require the appointment of a guardian to contract or to receive moneys thereunder or under an award for the benefit of any such minor. Any minor employed by his parent or parents shall have the right to file a claim for compensation under this act against such parent or parents in his own name and in his own right, and to enforce the payment of such compensation."

STATUTORY CONSTRUCTION ACT

By the Act of May 28, 1937, Page 1019, Article 4, Section 52, Number 4 of said section reads as follows:

"That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language;"

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IN THE

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OCTOBER TERM, 1940

NO. 384

HOWARD E. BREISCH,
Petitioner,

v.

CENTRAL RAILROAD OF NEW JERSEY

OPPOSING BRIEF OF RESPONDENT TO PETITION FOR CERTIORARI

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 110) is reported in 112 F. (2) 595.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 3, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statutes involved in this case are the Federal Safety Appliance Act of April 14, 1910 (Title 160, Sec. 2, 36 Stat. 298); and the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736.

QUESTION PRESENTED

Where an employee of a railroad company was employed and injured in the Commonwealth of Pennsylvania while neither he nor the railroad company was engaged in interstate commerce or transportation, did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law, and that his sole remedy was to recover compensation as provided under the Pennsylvania Workmen's Compensation Act?

STATEMENT OF THE CASE

The petitioner, Howard F. Breisch, brought an action in trespass to recover damages for injuries sustained by him while working for the respondent railroad company in the yard of the American Steel and Wire Company in Allentown, Pennsylvania, on December 31, 1936.

In his Complaint, petitioner averred that the crew to which he had been assigned, while in the act of shifting a freight car from which he fell, negligently caused the car to run away from its engine, and the respondent company, contrary to the provisions of the Federal Safety Appliance Acts, permitted the petitioner, its employee, to handle a freight car with a defective hand brake and coupler.

The respondent company filed an affidavit of defense in which it contended, among other things, that any rights which the petitioner might have in the matter were entirely controlled by and relegated to the Pennsylvania Workmen's Compensation Act of 1915.

At the trial of the case, it was definitely established, and the Trial Judge held, that neither the petitioner nor the respondent were engaged in interstate commeree or transportation at the time of the accident (R. 93).

The Trial Judge allowed the case to go to the jury upon a point of law reserved, and the jury rendered a verdict in favor of petitioner in the sum of $12,000.00, and after argument upon the reserved point and upon respondent's motion for judgment on the whole record, judgment was duly entered in the District Court in favor of the petitioner and against the respondent.

Whereupon respondent appealed to the Circuit Court of Appeals for the Third Circuit, which decided and held that petitioner's sole rights and remedies were under the Pennsylvania Workmen's Compensation Act and the judgment of the District Court was reversed.

ARGUMENT

(1)
The Circuit Court of Appeals Did Not Decide an Important Question of Local Law in Conflict with Applicable Local Decisions

The Pennsylvania Workmen's Compensation Act of 1915, P. L. 736, which was in full force and effect at the time of the accident herein complained of, provides as follows:

> "Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, *it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby,* unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place, and manner of such service, be filed with the Bureau within ten days after such service and before any accident has occurred. Every contract of hiring, oral, written, or implied from circumstances now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed

to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the Bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinabove prescribed."

"Section 303. Such agreement shall constitute an acceptance of all the provisions of article three of this act, and *shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or to any method of determination thereof, other than as provided in article three of this act.*"

In numerous cases decided subsequent to any of the Pennsylvania cases cited by petitioner, the Supreme Court of Pennsylvania has clearly and definitely enunciated and re-enunciated the principle that the Pennsylvania Workmen's Compensation Act provides the sole and exclusive method of securing compensation for injuries sustained by an employee and that an action in trespass will not lie.

See: *Venezia, Appellant v. Phila. Elec. Co.*, 317 Pa. 557 (decided February 4, 1935):

By the Court (page 558):

"Was plaintiff an employee of defendant when he was injured on June 2, 1931? The trial judge held that he was and that he therefore could not maintain this common-law action for damages, and accordingly entered a nonsuit, which the court in banc refused to take off. Plaintiff appealed."

"If plaintiff was at the time of the accident an employee of defendant, then the Workmen's Compen-

sation Act of June 2, 1915, P. L. 736, furnished the exclusive method of securing compensation for his injury, and an action in trespass would not lie: Campagna v. Ziskind, 287 Pa. 403; Persing v. Citizens Traction Co., 294 Pa. 230. As used in that act, the terms 'employer' and 'employee' are synonymous with 'master' and 'servant' (sections 103 and 104), and if plaintiff was at the time of the accident the servant of defendant he was also its employee: Persing v. Citizens Traction Co., supra; see Smith v. State Workmen's Ins. Fund, 262 Pa. 286" (page 559).

"Plaintiff's own testimony shows conclusively that he was a servant and therefore an employee of defendant, and the court below therefore acted properly in entering a nonsuit on the ground that he could not maintain an action of trespass for his injury, his sole remedy being that provided by the Workmen's Compensation Act" (page 560).

"Judgment affirmed."

Persing v. Citizens Traction Co., 294 Pa. 230:

By the Court:

"The real question for determination rests on the ruling of the court below which formed the basis for the entry of the nonsuit. It held that, under the circumstances presented, Persing, though generally employed by Jeffrey as a mechanic in his automobile business, was for the time being let as a driver of the tractor to the railway company. While so engaged he was under the control and subject to its orders, and, as a result, must be treated as an employee of the defendant at the time of the accident. The court therefore held that the Workmen's Compensation Act controlled, and any redress for the injury sustained must be secured as therein provided. If Persing was at the

time a servant of the street railway company, then the legislation referred to (June 2, 1915, P. L. 736) furnished a proper and exclusive method for securing compensation for the loss suffered in the course of his service, as its provisions were impliedly accepted by him. Where the plaintiff is within the scope of this statute when the injury occurs, an award of compensation as therein fixed must be held to furnish the only satisfaction obtainable, and an action in trespass will not lie" (page 234).

"If the plaintiff became a temporary servant of the defendant company, then no recovery in a common law action of trespass could be sustained. To defeat his suit, it was necessary to show that he was an employee, and this appears affirmatively from the record" (page 235).

Therefore, in the State of Pennsylvania, we start with the general proposition of law that an injured employee's only redress is under the State Workmen's Compensation Act.

In taking a contrary position, petitioner relies on two Pennsylvania cases, viz., *Sims v. Pennsylvania Railroad Company,* 279 Pa. 111, and *Miller v. Reading Co.,* 292 Pa. 44.

Consideration of the case of Sims v. Pennsylvania Railroad (*supra*) can be dismissed at once for the reason that no question concerning the Pennsylvania Workmen's Compensation Act was touched upon in that case.

As to the case of Miller v. Reading Co. (*supra*), the most that can be said for it is that it is an erroneous effort to interpret a Federal Statute and was so viewed by the Circuit Court of Appeals for the Third Circuit in deciding the case at bar. In its decision the Circuit Court of Appeals said (R. 110):

"In the light of the foregoing we must conclude that the Supreme Court of Pennsylvania reached the conclusion that the Compensation Act did not apply to Miller's case, not as a matter of the statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law. The conclusion reached by the Supreme Court of Pennsylvania constitutes an erroneous construction of federal statutes and is not binding upon us. The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law."

That this view of the Miller case (*supra*) so taken by the Circuit Court of Appeals is the correct one must be apparent by a reference to the case of *Tipton v. Atchison, Topeka and Santa Fe Railroad Company*, 298 U. S. 141, which is the last word on this subject and which is almost identical with the case at bar.

In the Tipton case (*supra*), the petitioner brought an action in California against the respondent to recover for injuries sustained by him in the course of employment as a switchman. The injury was caused by a defective coupling upon a freight car.

The Circuit Court of Appeals for the Ninth Circuit held, that as the petitioner, when injured, was not engaged in interstate commerce he could ask redress only under the California Workmen's Compensation Act, and when the petitioner sought review by your Honorable Court on the ground that the decision conflicted with the adjudication of the California Courts sustaining the right to obtain an action for damages in like circumstances, your Honorable Court held that the Circuit Court of Appeals committed no

error in construing the 'Workmen's Compensation Act as affording the only remedy available to the petitioner.

And in the Tipton case (*supra*), there had been cited two decisions by the courts of California to the effect that the plaintiff could bring an action for damages in the local courts, under similar circumstances, and despite the said Workmen's Compensation Law, and while neither of these cases were appellate cases, they, nevertheless, had both been appealed to the highest court of appeals in California and certioraries were denied. In this connection your Honorable Court said:

> "If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the Rigsby case, we should not hesitate to hold United States Courts bound by such construction of the State Statute. But the terms of the state compensation law, and the California decisions construing it, lead us to doubt that it is so" (page 152).

In order to clearly understand the weakness and inapplicability of the Miller case, we must first consider a similar case, decided by the Supreme Court of Pennsylvania about two years prior thereto, viz., *McMahan v. Montour Railroad Co.*, 283 Pa. 274. In this case, wherein plaintiff sought to recover from personal injuries, relying on the Federal Safety Appliance Acts, the Supreme Court of Pennsylvania in a per curiam opinion said (page 276):

> "We agree with the court below that the facts proved do not bring plaintiff within the act relied on, and it did not err in denying a right to recover in the present action. As said by the court below, 'The State of Pennsylvania has made ample provision for employees, who are injured in the course of their employment, in what is known as the Workmen's Compensa-

tion Act; to the tribunal provided in that statute the plaintiff in this case has recourse, and, in our opinion, to it alone'."

When the Montour case was subsequently reversed by your Honorable Court, the Pennsylvania Supreme Court, as suggested by your Honorable Court in the Tipton case, apparently missed the real reason for the reversal and, subsequently, when called upon to decide the Miller case, it was clearly influenced not only by its misunderstanding of the Montour reversal but also by the general misunderstanding of the decision of your Honorable Court in the Rigsby case.

In the Tipton case (*supra*), your Honorable Court said (page 148):

> "In McMahan v. Montour R. Co., 270 U. S. 628, cited by petitioner, the judgment of the state court was reversed, not because that court had held that the remedy for breach of duty imposed by the Safety Appliance Acts was afforded by the state workmen's compensation law, but because of its erroneous decision that the Federal Acts were inapplicable to the cars used in intrastate operation of the railroad, although it was a highway of interstate commerce."

In addition to the foregoing statement by your Honorable Court in the Tipton case, and further distinguishing and discarding the effect of the Miller case, your Honorable Court also said (page 147):

> "As respects an injury occurring during the course of employment in intrastate activities on a highway of interstate commerce, the question has arisen whether a state may substitute workmen's compensation for the common law or statutory action whereby damages could have been recovered for violation of the Safety Appliance Acts. A number of courts

have interpreted the discussion in the Rigsby Case as a denial of the power of the states to make the substitution (and here, in a foot-note, your Honorable Court refers to the Miller case among others)."

"This court has recently reaffirmed the principle that the Safety Appliance Acts do not give a right of action for their breach but leave the genesis and regulation of such action to the law of the states."

From the foregoing, it must be apparent that the Pennsylvania decision in the Miller case (*supra*), being at its best an erroneous effort to interpret a Federal Statute, cannot possibly prevail against the decision of your Honorable Court in the case of Tipton v. Atchison, Topeka and Santa Fe Railroad Company (*supra*), which squarely holds that petitioner's sole and exclusive remedy must be had under the State Workmen's Compensation Act.

---

(2)

The Decision of the Circuit Court of Appeals in This Case Does Not Conflict with Decisions of Other Circuit Courts of Appeals

---

Petitioner contends that the decision of the Circuit Court of Appeals in this case conflicts with the decision of other Circuit Courts of Appeals but the only case cited in support of this contention is the case of *Leuthe v. Erie R. R. Co.*, 83 F. (2d) 1013, which was affirmed by the Circuit Court of Appeals for the Second Circuit in a per curiam opinion.

To understand the force of this decision we must examine the opinion of the Lower Court (12 F. Supp. 161) which discloses that the case was also allowed to go to the jury under the provisions of the Federal Employer's Lia-

bility Act for the reason that at the time of the injury the plaintiff was engaged in interstate transportation or in work so closely allied to it as to be practically a part of it and therefore the New York Workmen's Compensation Act was clearly inapplicable.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals in the case at bar does not conflict with the above decision or with any other decision of any other Circuit Court of Appeals.

Conclusion

In view of your Honorable Court's decision in the above referred to case of Tipton v. Atchison, Topeka and Santa Fe Railroad (*supra*), which definitely clarified the law on this subject, and no element of interstate commerce or transportation appearing in this case, it is respectfully submitted that the Circuit Court of Appeals for the Third Circuit committed no error in holding that the Pennsylvania Workmen's Compensation Act affords the only remedy available to the petitioner; and inasmuch as the exigencies of this case are not of such importance as to require your Honorable Court to grant a writ of certiorari the petition should be dismissed.

Respectfully submitted,

AUBREY AND FRIEDMAN,

By: GEORGE W. AUBREY,

Attorneys for Respondent.

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Respondent.

BRIEF FOR RESPONDENT

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Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 110) is reported in 112 F. (2) 595, and the opinion of the District Trial Judge will be found on page 99 of the Record.

JURISDICTION

The jurisdiction of this Court arises under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and this Court's grant of a Writ of Certiorari herein on October 21, 1940.

STATEMENT OF THE CASE

Howard E. Breisch, the petitioner, brought an action in trespass against The Central Railroad Company of New Jersey, respondent herein, for injuries sustained by him while working for the respondent company in the yard of the American Steel and Wire Company in Allentown, Pennsylvania, on December 31, 1936.

Petitioner contended that the crew to which he had been assigned, while in the act of shifting the freight car from which he fell, negligently caused the car to run away from its engine, and, that the respondent company permitted the petitioner, its employee, to handle a freight car with a defective hand brake and coupler, contrary to the provisions of the Federal Safety Appliance Acts.

The respondent company contended, among other things, that any remedy which the petitioner might have in the matter was entirely controlled by and relegated to the Pennsylvania Workmen's Compensation Act of 1915, which was in full force and effect at the time of the accident.

Although at the trial of the case, for the purpose of bringing himself within the provisions of the Federal Employer's Liability Act, petitioner strenuously endeavored to prove (R. 14 to 18) that he was injured while engaged in interstate commerce or transportation, not only did petitioner utterly fail to prove same, but on the other hand it was clearly and definitely established, and the Trial Judge so held, that neither petitioner nor respondent were engaged in interstate commerce or transportation at the time of the accident (R. 93).

The Trial Judge allowed the case to go to the jury principally upon the question of damages, with a point of law reserved as to the applicability of the Pennsylvania

Workmen's Compensation Act, and the jury rendered a verdict in favor of petitioner in the sum of $12,000.00.

After argument upon the reserved point of law, and upon respondent's motion for judgment on the whole record, the Trial Judge directed the entry of judgment in favor of petitioner and against respondent.

Upon appeal to the Circuit Court of Appeals for the Third Circuit, respondent's contention that petitioner's remedy was exclusively under the Pennsylvania Workmen's Compensation Act was upheld, and the judgment of the District Court was reversed.

ARGUMENT

Petitioner's Sole and Exclusive Remedy Is under the Pennsylvania Workmen's Compensation Act

Inasmuch as petitioner completely failed in his effort to establish at the trial of this cause that either he or respondent company was engaged in interstate commerce or transportation at the time of the accident, his action cannot be maintained under the Federal Employers' Liability Act, and the only question remaining in this case is whether or not petitioner's remedy is confined solely and exclusively to the Pennsylvania Workmen's Compensation Act or whether he can maintain an action at Common Law.

The Pennsylvania Workmen's Compensation Act of 1915, P. L. 736, which was in full force and effect at the time of the accident herein complained of, provides as follows:

> "Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, *it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby,* unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place, and manner of such

service, be filed with the Bureau within ten days after such service and before any accident has occurred. Every contract of hiring, oral, written, or implied from circumstances, now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the Bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinabove prescribed."

"Section 303. Such agreement shall constitute an acceptance of all the provisions of article three of this act, and *shall operate as a surrender* by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or *to any method of determination* thereof, *other than as provided in* article three of *this act.*"

On the general question as to the rights of an injured employee to maintain a Common Law action for damages, the Supreme Court of Pennsylvania has clearly and definitely enunciated and re-enunciated the principle that he cannot do so and that the Pennsylvania Workmen's Compensation Act provides the sole and exclusive method of securing compensation for injuries sustained.

See: *Venezia, Appellant v. Phila. Elec. Co.*, 317 Pa. 557 (decided February 4, 1935):

By the Court (page 558):

"Was plaintiff an employee of defendant when he was injured on June 2, 1931? The trial judge held that he was and that *he therefore could not maintain*

this common-law action for damages, and accordingly entered a nonsuit, which the court in banc refused to take off. Plaintiff appealed."

"Plaintiff's own testimony shows conclusively that he was a servant and therefore an employee of defendant, and *the court below therefore acted properly in entering a nonsuit on the ground that he could not maintain an action of trespass for his injury, his sole remedy being that provided by the Workmen's Compensation Act*" (page 560). "Judgment affirmed." (Italics ours)

Although the general law of the State of Pennsylvania is as above set forth, petitioner contends that his case does not come within the purview of the Pennsylvania Workmen's Compensation Act, and to support this position cites the cases of *Sims v. Pennsylvania Railroad Company,* 279 Pa. 111, and *Miller v. Reading Company,* 292 Pa. 44.

As to the case of Sims v. Pennsylvania Railroad Company (*supra*), respondent respectfully submits that consideration thereof is unimportant and not helpful to the case presently under consideration, for the reason that in the Sims case no question concerning the Pennsylvania Workmen's Compensation Act was raised or touched upon.

As to the case of Miller v. Reading Company (*supra*), respondent contends that the most that can be said for it is that it is an erroneous effort to interpret a Federal Statute, and this view was concurred in by the Circuit Court of Appeals for the Third Circuit in deciding the case at bar. In this connection the Circuit Court said (R. 116):

"In the light of the foregoing we must conclude that the Supreme Court of Pennsylvania reached the conclusion that the Compensation Act did not apply

to Miller's case, not as a matter of the statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law. *'The conclusion reached by the Supreme Court of Pennsylvania constitutes an erroneous construction of federal statutes and is not binding upon us.* (Italics ours). The remedy of the appellee lies solely in the Pennsylvania Workmen's Compensation Act and was not cognizable in an action at law.''

The correctness of this finding by the Circuit Court of Appeals will be apparent by an analysis of the Miller case (*supra*) together with a reference to the opinion of Your Honorable Court in the case of *Tipton v. Atchison, Topeka and Santa Fe Railroad Company,* 298 U. S. 141, which closely followed the somewhat similar decision of *Gilvary v. Cuyahoga Valley Railroad Company,* 292 U. S. 57.

We will first refer to the Tipton case (*supra*), which is the last word of Your Honorable Court on this subject and which is almost identical with the case at bar.

In the said case of *Tipton v. Atchison, Topeka and Santa Fe Railroad Company,* 298 U. S. 141, the petitioner brought an action in California against the respondent to recover for injuries sustained by him in the course of employment as a switchman. The injury was caused by a defective coupling upon a freight car.

The Circuit Court of Appeals for the Ninth Circuit held, that as the petitioner, when injured, was not engaged in interstate commerce he could ask redress only under the California Workmen's Compensation Act, and when the petitioner sought review by Your Honorable Court on the ground that the decision conflicted with the adjudication

of the California Courts sustaining the right to obtain an action for damages in like circumstances, Your Honorable Court held that the Circuit Court of Appeals committed no error in construing the Workmen's Compensation Act as affording the only remedy available to the petitioner.

And in the Tipton case (*supra*), there had been cited two decisions by the courts of California to the effect that the plaintiff could bring an action for damages in the local courts, under similar circumstances, and despite the said Workmen's Compensation Law, and while neither of these cases were appellate cases, they, nevertheless, had both been appealed to the highest court of appeals in California and certioraries were denied. In this connection Your Honorable Court said:

> "If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the Rigsby case, we should not hesitate to hold United States Courts bound by such construction of the State Statute. But the terms of the state compensation law, and the California decisions construing it, lead us to doubt that it is so" (page 152).

> "We are of opinion the Circuit Court of Appeals committed no error in construing *the Workmen's Compensation Act as affording the only remedy available to the petitioner*" (page 155). (Italics ours.)

See also: *Gilvary v. Cuyahoga Valley Railway Co.*, 292 U. S. 57. In this case there was an action brought by a railroad employee against his employer for personal injuries alleged to have been caused by the railroad's failure to comply with the Federal Safety Appliance Acts. The railroad set up as a defense a mutual election to be bound by the State Compensation Act, but the lower court held that such an agreement was not sufficient to constitute a

defense, being repugnant to the Federal Safety Appliance Acts, and the trial resulted in a verdict and judgment for the employee. The Ohio Court of Appeals reversed this judgment and gave final judgment in favor of the railroad, holding that the election to be bound by the Workmen's Compensation Act was a complete bar to any other right of recovery, and Your Honorable Court in affirming this ruling, said (page 61):

> "Petitioner cites language in Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 41, 60 L. ed. 874, 878, 36 S. Ct. 482. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law,' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.' Moore v. Chesapeake & O. R. Co., 291 U. S. 205, ante, 755, 54 S. Ct. 402, supra; Minneapolis & St. P. R. Co. v. Popplar, 237 U. S. 369, 372, 59 L. ed. 1000, 1001, 35 S. Ct. 609. These Acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. *They do not extend to the field occupied by the state compensation act.* There is nothing in the agreement repugnant to them." Affirmed (Italics ours.)

See also *Gerathy v. Lehigh Valley Railroad*, 83 Fed. (2nd) 738, which was decided in 1938 by the Circuit Court of Appeals for the Second Circuit, and which held as follows:

"This action is for damages due to negligent acts resulting in the death of appellee's intestate. Appellant was charged with violation of the Federal Employers' Liability Act and the Federal Safety Appliance Acts . . . . . Since the appellee's intestate was not engaged in interstate commerce and could recover only for a violation of the Safety Appliance Act, and *since nothing in the Safety Appliance Act forbids the application of the New Jersey Workmen's Compensation Law, that law affords the only remedy available to appellee and precludes a recovery in this action.*" Judgment reversed. (Italics ours.)

The Pennsylvania Case of Miller v. Reading Railroad Company (supra), Relied on by Petitioner, Constituted an Erroneous Construction of a Federal Statute

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Prior to the Tipton and Gilvary cases (*supra*), a number of courts apparently missed the real point in the case of *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, and wrongly interpreted that decision to deny to a State the right to substitute Workmen's Compensation for a common-law action for damages which could have been recovered for a violation of the Safety Appliance Acts.

In this category is the Pennsylvania case of *Miller v. Reading Company*, 292 Pa. 44, and in this connection Your Honorable Court, in the Tipton case (*supra*), said (page 147):

"As respects an injury occurring during the course of employment in intrastate activities on a highway of interstate commerce, the question has arisen whether a state may substitute workmen's compensation for the common law or statutory action whereby damages could have been recovered for violation of the Safety

Appliance Acts. A number of courts have interpreted the discussion in the Rigsby Case as a denial of the power of the states to make the substitution (and here, in a foot-note, Your Honorable Court refers to the Miller case among others)."

"This court has recently reaffirmed the principle that the Safety Appliance Acts do not give a right of action for their breach but leave the genesis and regulation of such action to the law of the states."

To further demonstrate the inapplicability of the Miller case (*supra*) we will refer to another and similar Pennsylvania Supreme Court Case which was decided just about two years prior to the Miller case, viz., *McMahan v. Montour Railroad Co.*, 283 Pa. 274.

In the McMahan case, wherein plaintiff sought to recover damages for a violation of the Safety Appliance Acts, the Supreme Court of Pennsylvania said (page 276):

"We agree with the court below that the facts proved do not bring plaintiff within the act relied on, and it did not err in denying a right to recover in the present action. As said by the court below, '*The State of Pennsylvania has made ample provision for employees, who are injured in the course of their employment, in what is known as the Workmen's Compensation Act; to the tribunal provided in that statute the plaintiff in this case has recourse, and, in our opinion, to it alone*'." (Italics ours.)

However, Your Honorable Court subsequently reversed the Supreme Court of Pennsylvania in the McMahan case (See 270 U. S. 628) not on account of its application of the Workmen's Compensation Act, but for the reason that it had also held that the provisions of the Safety Appliance Acts were inapplicable to railroad cars used in intrastate operations of the railroad even though the railroad was a highway of interstate commerce.

As was stated by Your Honorable Court in the Tipton case (*supra*), the Pennsylvania Supreme Court also apparently missed the real reason for the reversal in the McMahan case, and in a comparatively short time thereafter when called upon to decide the similar case of Miller v. Reading Co. (*supra*), the Supreme Court of Pennsylvania changed the position it had taken in the McMahan case, clearly because it was influenced not only by its misunderstanding of Your Honorable Court's decision in the Montour case, but by a misunderstanding of the decision in the Rigsby case as well.

In this connection, as was said by Your Honorable Court, in the Tipton case (page 148):

> "In McMahan v. Montour R. Co., 270 U. S. 628, cited by petitioner, the judgment of the state court was reversed, *not because that court had held that the remedy for breach of duty imposed by the Safety Appliance Acts was afforded by the state workmen's compensation law*, but because of its erroneous decision that the Federal Acts were inapplicable to the cars used in intrastate operation of the railroad, although it was a highway of interstate commerce." (Italics ours.)

Moreover, in the Miller case (*supra*) the Supreme Court of Pennsylvania cites and quotes with approval an opinion by the United States Circuit Court of Appeals for the Second Circuit in the case of *Director General v. Ronald*, 265 Fed. 138.

As matter of fact, this case of Director General v. Ronald (*supra*) is one of the cases mentioned by Your Honorable Court in the Tipton case as having misunderstood the Rigsby decision, and the same United States Circuit Court of Appeals for the Second Circuit subsequently corrected its erroneous position by its opinion in the more recent case of *Geraghty v. Lehigh Valley Railroad*, 83 Fed. (2nd) 738, as hereinbefore quoted.

In the Miller case (*supra*), the Supreme Court of Pennsylvania, quoting from the case of Director General v. Ronald, said (page 49):

> "Bound as we are by the pronouncement there (in the Ross Case) and the reasons therefor, as expressed by the Supreme Court (Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33), and more recently adhered to by the denial of the writ in the Ross Case, I conclude that plaintiff below may recover here, irrespective of his engagement in interstate commerce * * * Liability is expressed and fixed by the statute itself, and is to be found therein. That federal act takes precedence over the State Workmen's Compensation Act."

The Supreme Court of Pennsylvania in the Miller case (*supra*) then went on to say (page 50):

> "*The Act of Congress gave to the employee rights not granted under state laws*, and our courts have frequently sustained proceedings based on the federal statute in question (Sims v. P. R. R. Co., supra, and cases there cited) and the exercise of this jurisdiction has been approved on appeal to the United States Supreme Court: McMahan v. Montour R. R. Co., supra." (Italics ours.)

But in the Tipton case (*supra*), which is the last word on the subject, we again call attention to the fact that Your Honorable Court said (page 147):

> "This court has recently reaffirmed the principle that *the Safety Appliance Acts do not give a right of action for their breach*, but leave the genesis and regulations of such action to the law of the states." (Italics ours.)

And in the Gilvary case (*supra*) Your Honorable Court said (page 61):

> "*These acts do not create,* prescribe the measure, or govern the enforcement of, *liability arising from the breach. They do not extend to the field occupied by the State Compensation Act.*" (Italics ours.)

Therefore, the best that can be said for the Miller case (*supra*) is that like the Ballard and Walton cases referred to in the Tipton case (*supra*), *it is an erroneous effort to interpret a Federal Statute* and attempts to set up a new right and liability where no new right and liability is created, and all of which is directly contrary to the decisions of Your Honorable Court as expressed in the Tipton and Gilvary cases (*supra*).

In the dissenting opinion filed in the case at bar by the Honorable Circuit Court Judge Jones, he concedes therein (R. 121) that where a state court acts upon a mistaken notion as to a federal statute, the state decision is not binding on the Federal Court and, in his opinion goes on to say (R. 126):

> "It is true, as the majority of this court point out, the opinion of the Pennsylvania Supreme Court in the Miller case contains statements which indicate that that court thought that the Federal Safety Appliance Acts imply an employee's right of action for their breach which it is the duty of the states to supply or recognize by way of an action at law for damages."

But, unlike the majority opinion, nowhere does he seem to have taken into consideration the misconception that the Pennsylvania Supreme Court had as to the reason for its reversal by Your Honorable Court in the McMahan case (*supra*) which, together with its misapplication of the Rigsby, Ronald and Ross cases, directly lead it into the subsequent misconstruction of the Federal Safety Appliance Act in the Miller case (*supra*), and that therefore the Miller case should not prevail.

Respondent respectfully submits that the dissent by Circuit Court Judge Jones is not well taken, and is not only directly in conflict with the opinions of Your Honorable Court in the Tipton and Gilvary cases (*supra*), but is also fully and completely answered by the recent opinion of Your Honorable Court in the case of *State Tax Commission v. Van Cott*, 306 U. S. 511, wherein Your Honorable Court, through Mr. Justice Black, said (p. 154):

> "If the court were only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law. Whatever exemptions the Supreme Court of Utah may find in the terms of this statute, its opinion in the present case only indicates that 'it thought the Federal Constitution (as construed by this Court) required' it to hold respondent not taxable."

In petitioner's brief (page 11), reference is made to the opinion of the District Court Judge who originally tried the case under consideration.

An examination of that opinion (R. 99) will clearly disclose that it was not predicated upon any decision of a Pennsylvania Court, but oddly enough upon the unwarranted conclusion that the Pennsylvania Workmen's Compensation Act was not applicable for the reason that the contract of hiring *might have been* entered into outside of the State of Pennsylvania.

We quote from that part of the Trial Judge's opinion which, aside from a discussion of the case, includes practically his entire finding (R. 104):

> "For ought we know, the contract of employment was made outside of Pennsylvania whose Statutes were unthought of and not binding upon the parties, and the plaintiff had no right to compensation. The Miller case is decisive of this."

> "We hold that the provisions of the Act do not apply to parties whose contract of employment was entered into outside of the State of Pennsylvania and who have not agreed to pay and accept compensation. The plaintiff does not lose his right of action except only as he has agreed and has been given a substitute right to the compensation provided by the Act. Here he has no right to compensation."

> "The motion for a new trial and for judgment n. o. v. are both denied, with exception to defendant, and plaintiff may enter judgment on the verdict, with costs."

On this point, Section 1 of the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736, itself provides:

> "Section 1. Be it enacted, &c., That this act shall be called and cited as The Workmen's Compensation Act of 1915, and *shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made,* renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth." (Italics ours.)

Nor was there a scintilla of evidence in the case to show that the contract of employment was made outside of Pennsylvania, and a mere reference to the Bill of Complaint as filed by petitioner (R. 4) or to the Statement of the Case as set forth in the Petitioner's Brief (page 3) will

clearly establish the undisputed fact that the accident did occur in the State of Pennsylvania.

Therefore, the decision of the Trial Judge is patently incorrect and can be of little or no help to the petitioner in this case.

CONCLUSION

In conclusion, respondent respectfully contends that the Circuit Court of Appeals for the Third Circuit was correct in concluding that in the State of Pennsylvania the Pennsylvania Workmen's Compensation Act furnishes the sole and exclusive method of securing compensation for injuries sustained by employees engaged only in intrastate commerce or transportation.

Therefore, and by reason of all of the foregoing, it is respectfully submitted that the decision of the majority of the Circuit Court of Appeals for the Third Circuit should be affirmed, and petitioner's Writ of Certiorari should be dismissed.

Respectfully submitted,
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Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 384.—October Term, 1940.

Howard E. Breisch, Petitioner, *vs.* Central Railroad of New Jersey.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here the question as to whether the law of Pennsylvania limits recovery under the provisions of the Federal Safety Appliance Acts to the procedure and awards of that state's Workmen's Compensation Act in accidents where the railway employee is engaged in an intrastate activity at the time of injury.

The suit was brought at common law in the Federal District Court for the Eastern District of Pennsylvania on the ground of diversity of citizenship. The employee, petitioner here, was a citizen of Pennsylvania and the defendant was a corporation created under the laws of New Jersey, handling transportation moving between states. The basis of the action was respondent's violation of the Safety Appliance Acts by failure to furnish efficient hand brakes for a car.[1] This failure resulted in an injury to petitioner in Pennsylvania. No interstate commerce was involved. He recovered in the trial court but the judgment was reversed by the Circuit Court of Appeals on its determination that the remedy of the petitioner lay solely in the Compensation Act and was not cognizable at law.[2] We granted certiorari because of an alleged conflict on a question of local law between the judgment below and *Miller* v. *Reading Company*.[3]

No issues arise except the one upon procedure. It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance

[1] Act of April 14, 1910, § 2, 36 Stat. 298.
[2] 112 F. (2d) 595.
[3] 292 Pa. 44.

Acts.[4] Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts.[5] The federal statutes create the right; the remedy is within the state's discretion. In this case we are to find what remedy the State of Pennsylvania has provided.

This Court had occasion to consider the matter of what remedies for breach of the Federal Safety Appliance Acts had been provided by a state in *Tipton* v. *Atchison, Topeka & Santa Fe Railway Company.*[6] The circumstances there were quite similar to the present case. Tipton was an employee of a railroad which was a highway of interstate commerce and suffered injury through violation of the safety acts while engaged within California in intrastate transportation. He sought damages at common law and, after removal to the federal court, was cast in the litigation on the ground that his only redress lay through the California Workmen's Compensation Act. In affirming this conclusion here, two cases of the district courts of appeal of California were examined—*Ballard* v. *Sacramento Northern Railway Company*[7] and *Walton* v. *Southern Pacific Company.*[8] Petition for review of the two cases had been refused by the Supreme Court of California.[9] The *Ballard* case treated section 6 of the act of April 22, 1908,[10] the jurisdictional section of the Federal Employers Liability Act, as applicable to the cause of action under consideration, although that cause was bottomed upon the Safety Appliance Acts. From that premise the California court went ahead to conclude that its Workmen's Compensation Act did not apply by virtue of section 69(c) of the Compensation Act.[11] That section omitted employments governed by

[4] Texas Pacific Ry. Co. *v.* Rigsby, 241 U. S. 33; Tipton *v.* Atchison Ry. Co., 298 U. S. 141.

[5] Moore *v.* C. & O. Ry. Co., 291 U. S. 205; Gilvary *v.* Cuyahoga Valley Ry. Co., 292 U. S. 57; Tipton *v.* Atchison Ry. Co., *supra* note 4.

[6] 298 U. S. 141.

[7] 126 Cal. App. 486.

[8] 8 Cal. App. (2d) 290.

[9] 126 Cal. App. at 501 and 8 Cal. App. (2d) at 305.

[10] 35 Stat. 66 as amended April 5, 1910, 36 Stat. 291, and March 3, 1911, §291, 36 Stat. 1167. There has been a subsequent amendment immaterial here, Aug. 11, 1939, § 2, 53 Stat. 1404.

[11] Section 69 provided:

"(c) *Employers engaged in interstate commerce.* This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

the acts of Congress. The Compensation Act is the exclusive state remedy for injuries within its scope. The Federal Employers Liability Act does give a right of action and fix the tribunals where it may be enforced.[12] Thus through assimilating the rights and remedies under the Safety Appliance Acts to those under the Federal Employers Liability Act, the California Workmen's Compensation Act was found inapplicable. *Walton's* was a similar case and it too, page 305, following *Ballard*, permitted the maintenance of the suit in the state court.

This Court was of the view that the California courts excluded these railroad employees from the benefits of the Compensation Act "because they [the courts] thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages" and for that reason refused to follow their interpretation of the Compensation Act. Although the *Tipton* case decided the only available California remedy was the compensation scheme, it was indicated that "a definite and authoritative decision" to the contrary by the California courts would, of course, be followed.[13] Tipton lost through the determination here that California had declared by its statute he must seek relief through compensation.

In the present case, Breisch sued at common law. The Circuit Court of Appeals reversed the judgment in his favor on the ground that the Pennsylvania Workmen's Compensation Act supplied the exclusive remedy for his injury. To reach this conclusion, the Court determined that in *Miller* v. *Reading Company*[14] the Supreme Court of Pennsylvania decided that "the Compensation Act did not apply to *Miller's* case, not as a matter of statutory construction of that Act but because it thought that the proper construction of the Federal Safety Appliance Acts required the ruling that Miller had a cause of action under the Safety Appliance Acts, cognizable in a court of law but not within the purview of the Compensation Law." Reliance was placed upon the *Tipton* case and *Red Cross Line* v. *Atlantic Fruit Company*[15] which support the principle that

[12] Moore *v.* C. & O. Ry. Co., 291 U. S. 205, 215, 216, and §1 and §6, 45 U. S. C. 51 and 56.

[13] A later decision of the Supreme Court of California is in accord with this Court's ruling in the Tipton case. Scott *v.* Industrial Accident Comm., 9 Cal. (2d) 315, 323.

[14] 292 Pa. 44.

[15] 264 U. S. 109, 120.

interpretation of state statutes by state courts under compulsion of federal law erroneously understood does not bind federal courts.

It is not apparent to us, however, that the *Miller* opinion depends upon the compulsion of a misunderstanding of the Safety Appliance Acts. In *McMahan* v. *Montour Railroad Company*,[16] it is true, the Supreme Court of Pennsylvania held the Compensation Act was the exclusive remedy for injuries to employees of interstate railroad highways, when the employees at the time of the injury were engaged in an intrastate movement. But that case was predicated upon an erroneous conception of the relation of the employee to interstate commerce. It was thought that only employees who were engaged in that commerce at the time of the accident were covered by the Safety Appliance Acts.[17] Nothing was said as to the tribunal which might award relief in employments covered by the Safety Appliance Acts. This Court's citations on reversal dealt only with the scope of the federal acts, not with remedies under them.[18] When the question next arose, in the *Miller* case, the Pennsylvania court undertook an interpretation of the scope of the coverage of the Workmen's Compensation Act. That act provides in Section 302:

"(a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be . . . ."

(Article three is the compensation schedule.) There are no exceptions to this except the customary exemptions of domestic service or agriculture.[19] In the *Miller* case, compensation coverage was refused employees of interstate roads engaged in intrastate activities in these words:

"Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands, not arising from the ordinary relation of employer and employee, such as the enforce-

16 283 Pa. 274.

17 Tipton *v.* Atchison Ry. Co., 298 U. S. 141, 148.

18 McMahon *v.* Montour Railroad Co., 270 U. S. 628.

19 Pa. Laws 1915, p. 777.

ment of rights fixed by federal statute, their powers remain as if no such state legislation was in force."[20]

Though there undoubtedly were other statements in the course of the opinion which reflect a misconception of the state's authority over procedure for recovery under the Safety Appliance Acts, we conclude that such misconception is not enough to call for a refusal to follow the Supreme Court's definite ruling that the state courts were open for redress for accidents covered by the Safety Appliance Acts.

State Tax Commission v. *Van Cott*,[21] relied upon to support the conclusion reached below, is not controlling. In that case a direct review of the question decided by the state court was sought here on the ground that the state's conclusion on a matter of construction of a state income tax statute was controlled by the decisions of this Court on the taxability by states of salaries of federal employees. It was not clear to us whether the state decision was controlled by the state court's view of our decisions or not. And, as our decisions at the time of review here permitted a decision by the state court on the state statute, free from federal constraint, we returned the case for state action. In the *Van Cott* case we were reviewing an application of federal law by a state court to a solution of a state's problems. Here we have a federal court's interpretation of a long standing state decision. Uncompleted state action, probably influenced by decisions of this Court subsequently overruled, calls for an opportunity for the state to adjudicate the question for itself, while a fixed interpretation of a state statute should be accepted by the federal courts when it does not obviously depend altogether on a misconception of federal law.

There are other factors which forbid the conclusion below. A Pennsylvania statute, derived from the state's common law,[22] provides "That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language."[23] Since the *Miller* case the compensation act has been

[20] 292 Pa. at 50.

[21] 306 U. S. 511.

[22] Buhl's Estate, 300 Pa. 29.

[23] Pa. Laws 1937, Act No. 282, § 52(4).

amended several times,[24] but the Legislature has never attempted to override the limitations read into it by the *Miller* opinion. There were comprehensive amendments in the 1937 reenactment,[25] more than a year after this Court's decision in the *Tipton* case established that the compensation remedy could be made exclusive, but still the Legislature took no action. Under these circumstances we are of the opinion that the interpretation of the Supreme Court of Pennsylvania of its own Workmen's Compensation Act and of the jurisdiction of its courts over claims arising under the Safety Appliance Act is binding upon the federal courts and should be followed.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Mr. Justice ROBERTS is of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[24] Pa. Laws 1929, Acts No. 311, 358, 361, 372; Laws 1931, Acts No. 151, 205; Laws 1933, Acts No. 68, 324, 328; Laws, Special Session 1933-34, Acts No. 55, 56; Laws 1935, Act No. 412; Laws 1937, Act No. 323.

[25] Pa. Laws 1937, Act No. 323.